Case No: HQ16X01238, HQ17X02637 and HQ17X04248

Neutral Citation Number: [2019] EWHC 871 (QB)

THE POST OFFICE GROUP LITIGATION

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 9 April 2019

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

Alan Bates and Others	**Claimant**
- and -	
Post Office Limited	**Defendant**

- -

Judgment (No.4) "Recusal Application"

- -

Patrick Green QC, Kathleen Donnelly, Henry Warwick, Ognjen Miletic and Reanne Mackenzie (instructed by Freeths LLP) for the **Claimants** (the Respondents to the application)
Lord Grabiner QC, David Cavender QC and Gideon Cohen (instructed by Womble Bond Dickinson LLP) for the **Defendant** (the Applicants)

Hearing date: 3 April 2019

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Mr Justice Fraser:

Introduction

1. These proceedings are being conducted pursuant to a Group Litigation Order ("GLO") made on 22 March 2017 by Senior Master Fontaine. There is one substantive judgment dealing with what the parties referred to as the "Common Issues" which is called Judgment (No.3) "Common Issues". This is at [2019] EWHC 606 (QB). Other judgments, which concern procedural rather than substantive issues, are at [2017] EWHC 2844 (QB) and [2018] EWHC 2698 (QB). These were numbered Judgment No.1, and Judgment No.2. It is the substance of Judgment No.3 "Common Issues" that is relevant to the application the subject matter of this judgment. There were 23 different Common Issues between the parties that were decided in Judgment No.3. The Post Office, the defendant in these proceedings, issued an application on Thursday 21 March 2019 that I recuse myself as the Managing Judge in the whole group litigation, and adjourn what is called the "Horizon Issues" trial, which commenced on 11 March 2019 and had been underway for two weeks when the recusal application was issued. That trial had almost reached the end of both sides' evidence of fact at that stage. The relief sought also included an adjournment of the Horizon Issues trial, but as I explain at [15] below, in reality it means abandonment of that trial so that it can be started again before another judge at some unspecified date in the future.

2. My first involvement with this case came after I was appointed the Managing Judge in April 2017. I issued Directions Order No.1 on 25 April 2017 which ordered the 1st Case Management Conference ("CMC") to take place before me on 19 October 2017, a date six months later. This was the first date possible due to paragraph 40 of the Group Litigation Order itself, which was made on 22 March 2017. That required a CMC to be held on "the first open date after 18 October 2017". 19 October 2017 was therefore the earliest date upon which such a CMC could take place before me. In the Introduction to Judgment No.3 at [2] to [43], I set out an extensive background to the Group Litigation, which I will not fully repeat here. In general terms, the litigation concerns claims by about 550 sub-post masters and mistresses (or "SPMs") who used to run branch Post Offices. The subject matter of the litigation is the Horizon computerised system ("Horizon"). Horizon is the computerised point of sale system which was adopted by the Post Office in 2000 and is used in all its branches. It also deals with individual SPMs branch accounts.

3. SPMs are men and women who run small retail businesses, in which branch Post Offices are located. They operate the branches, selling Post Office and other products (such as postal orders, postage stamps and so on) to members of the public, and the cash and stock in those branches belong to the Post Office. Stamps are in fact products that belong to the Royal Mail, but most readers of this judgment will be aware of what branch Post Offices are, and what they do. The Post Office also has a large number of what are called "clients", including (for example) Camelot for the National Lottery, the Bank of Ireland for banking products, the DVLA and other similar institutions. SPMs both sell, and provide services in respect of, these products too on behalf of the Post Office, and the Post Office has separate arrangements with its clients for these services to be provided to the public in branch Post Offices. The

Post Office pays SPMs remuneration, but they are not employees of the Post Office. They are self-employed small businesspeople. A small number of branch Post Offices are run through limited companies. Prior to 2000, SPMs accounted to the Post Office using a paper-based system. Horizon was introduced in 2000, and in 2011 the Horizon system became an online system. In the litigation, the Horizon system from 2000 to 2011 is called "Legacy Horizon", and thereafter it is called "Horizon Online" or "HOL". The litigation concerns both Legacy Horizon and Horizon Online.

4. The claimants' case is that Horizon contained, or must have contained, a large number of software coding errors, bugs and defects, and as a result apparent shortfalls and discrepancies would, and did, appear in SPMs' branch accounts. The subject matter of the litigation is highly controversial, and none of the claimants' claims are admitted. The claimants allege that when financial, accounting and other shortfalls occurred in branch accounts, the Post Office did not investigate these fairly or properly; required claimants to make good the alleged shortfalls; excluded claimants from their own branches; suspended and/or terminated their appointments; and imposed undue and/or unreasonable pressure or influence upon them to resign, or otherwise end their contract with the Post Office. It is also claimed that the Post Office unfairly investigated them, prosecuted some of them for theft, false accounting and/or other criminal charges, and acted unreasonably so as to prevent them from recovering the value of their businesses. It is also the claimants' case that throughout the relevant period (which is from 2000 onwards) the Post Office has concealed material facts from them and misled them about the reliability of Horizon and the errors in, and generated by, Horizon. This concealment is said to have included the ability of the Post Office (but most particularly its IT provider Fujitsu) remotely to access and make changes to transactions, data and/or branch accounts on Horizon, without the knowledge of the particular SPMs in question. Claims are also made in the torts of deceit, malicious prosecution, duress and harassment. The Post Office strongly defends all these allegations, maintains that the Horizon system is what is called robust and can be relied upon, and maintains that in the great majority of cases the shortfalls and discrepancies that arose are explicable by carelessness or dishonesty on the part of SPMs and their staff. Defences raised by the Post Office include the burden of proof, false accounting, failure to maintain records, estoppel, accord and satisfaction, account stated, settlement agreements, res judicata, issue estoppel, abuse of process, limitation, reflective loss and set off. A counterclaim is made by the Post Office for the amounts of unrecovered shortfalls, damages for breach of contract, fraud and/or conversion, an order for reconstitution of any trust fund and/or compensation in equity, and restitution in respect of amounts by which the claimants have been unjustly enriched.

5. The role of a Managing Judge in Group Litigation is to case manage the proceedings and try the issues. CPR Part 19 rules 19.10 to 19.15 set out the specific provisions relevant to Group Litigation. Under CPR Part 19 rule 19.12(1) where a judgment or order is made in a claim in relation to one or more GLO issues, such a judgment or order is binding upon the parties to all the other claims in the Group Litigation unless the court orders otherwise. Practice Direction 19B paragraph 8 states that the Managing Judge "will assume overall responsibility for the management of the claims and will generally hear the GLO issues." PD19B Paragraph 15.1 states that directions may be given for the trial of common issues and for the trial of individual issues.

PD19B Paragraph 15.2 states "common issues and test claims will normally be tried at the management court".

6. In this litigation, the first group of common issues (which both the court and the parties have called the "Common Issues") relate to the contractual and agency relationship between the Post Office and SPMs. The litigation spans a long period of time, namely from 2000 until 2016. The Post Office changed the terms upon which SPMs contracted with it in 2011, when what was called the Standard Sub-Postmaster Contract (or "SPMC", which also existed in modified form from 2006 as the "Modified SPMC") was replaced with the National Transformation Contract or "NTC". The SPMC had existed from 1994, some years prior to the introduction of Horizon and when branch accounts were paper based. The Common Issues govern contractual and agency issues concerning the claimants, and arise under both the SPMC and the NTC contract forms.

7. The Common Issues trial took place between 7 November and 6 December 2018. Case management directions have been given for other rounds of the litigation going forwards, and the trial of a second round of substantive issues, called the "Horizon Issues", commenced on 11 March 2019. The Horizon Issues trial involves the computer-specific issues, and for these issues each party is calling an expert in computing or IT. There are 15 such computing issues. One is to what extent was it possible or likely for bugs, errors or defects in the Horizon system to have the potential to cause apparent or alleged discrepancies or shortfalls relating to SPMs' branch accounts or transactions? Another is whether the Post Office and/or Fujitsu was able to access transaction data recorded by Horizon remotely (which means not from within a branch). The IT experts have issued four joint statements agreeing certain points. They have each served two expert reports.

8. A third trial is to take place in November 2019, dealing with limitation issues and other general issues that have the potential to affect a great many claims in the group. For example, if the limitation defences raised by the Post Office succeed, any claimant who issued proceedings after the relevant date when their respective limitation periods expired will find their claim time-barred. A fourth trial is to take place in early 2020, in respect of other issues or claims which have not yet been finalised.

9. The intention in ordering the trial of groups of issues in this way is to provide the parties with resolution of as many issues as possible, that impact upon the claims of as many claimants as possible. There are not currently any orders in respect of fully trying any individual claims through to their conclusion in terms of any breach, causation and loss, nor as test claims, nor to any of the counterclaim issues, which allege breach of contract and breach of fiduciary duty. These may occur in round 4 in 2020. The litigation is very wide in scope. The financial sums in total in terms of branch losses alone are said to be approximately £18 million, but the wider claims are greater than that, including damages claims for the different causes of action to which I have referred, and there is no finalised figure for quantum of all the different claimants, and there is no currently pleaded figure for the counterclaim for obvious reasons.

10. The judgment in the Common Issues trial took some time to prepare. I had told the parties that, although knowledge of the result of the Common Issues trial was not absolutely necessary for the Horizon Issues trial, I would do my best to distribute that judgment before the Horizon Issues trial commenced. The draft judgment was distributed to the parties on 8 March 2019. On 11 March 2019 the Horizon Issues trial commenced, and I explained on Day 1 of that trial that I had continued refining the draft since its distribution, but that I had wanted the parties to know at least the answer to the Common Issues themselves prior to commencing the Horizon Issues trial. In the evening of 11 March 2019 I received a communication from Leading Counsel for the Post Office in the Common Issues trial (copied to Leading Counsel for the claimants) drawing my attention to comments in relation to the cross-examination of Mrs Stockdale which he considered to be unfair. These comments had already been changed by me in the draft judgment process of refinement between 8 and 11 March 2019, and so I did not require any observation from the claimants' counsel. Those comments did not appear in the handed down version of Judgment No.3.

11. The ongoing trial concerns what the parties referred to at the case management stage as the Horizon Issues. The case management of this litigation was intended to resolve the contractual issues (which affected all the claimants) and then the computer issues relating to the operation, functionality and reliability of the Horizon system (which also affected all the claimants) first. The parties needed time to prepare for these two trials, which took place in late 2018 (for the Common Issues) and into the spring of 2019 (for this one), in particular to perform disclosure, and prepare and serve evidence. This included the expert evidence for the Horizon Issues to which I have referred from the two IT experts, Mr Coyne for the claimants, and Dr Worden for the Post Office.

12. After oral opening submissions by both parties on 11 March 2019, the claimants' evidence of fact (8 witnesses) were cross-examined from 12 March 2019. One of the witnesses of fact called by the claimants and cross-examined by the Post Office was Mr Rolls, a former Fujitsu employee who has been referred to by the claimants "a Fujitsu whistle-blower". Some of the witnesses of fact called by the Post Office and cross-examined by the claimants are existing employees of Fujitsu, including the Chief Architect of Horizon on the Post Office account.

13. I had received lists of typographic and other corrections in respect of the draft of Judgment No.3 during the first week of the Horizon Issues trial, and I handed down Judgment No.3 "Common Issues" on the Friday at the end of that week, 15 March 2019.

14. The Post Office then called its witnesses of fact during the second week of the trial, namely that commencing 18 March 2019, and had called 8 of its witnesses by 21 March 2019. Mr Godeseth, the Chief Architect of Horizon on the Post Office account, who is currently employed by Fujitsu but prior to that had been employed by the Post Office, commenced his cross-examination on 20 March 2019, and at 1.00pm on 21 March 2019 was nearing the very end of his evidence. The only remaining Post Office witnesses of fact were due to finish that same day with Mr Parker (also of Fujitsu), with the possibility of another witness Mr Membery (also Fujitsu) potentially being heard on another date due to personal circumstances of ill health.

15. However, during court proceedings on the final day of evidence on 21 March 2019 during the morning, and unknown to me (as both my clerk and I were in the trial) the Post Office issued and served an application seeking to have me recuse myself as the Managing Judge from the Group Litigation entirely ("the recusal application"), as well as adjourning the Horizon Issues trial. This was not mentioned in court at any time during that morning. I learned of this at 1.55pm on 21 March 2019 just before I came back into court for the afternoon session. In reality, although the draft order used the word "adjourn", it seemed on the face of it that the application sought to have me abandon the Horizons Issues trial altogether, so that it could be started from the beginning with a different Managing Judge. The recusal application was served on the claimants' legal team at about the same time, although it was sent to the claimants' counsels' chambers.

16. This presented some immediate case management issues for the ongoing trial which had to be addressed in very short order. The recusal application had to be heard. However, Mr Godeseth was coming towards the very end of his cross-examination. To have stopped the trial immediately, in mid-cross examination, would have led to him not being able to talk to anyone about the case (including people with whom he works at Fujitsu, where he is the Chief Architect on the Post Office account) until after the hearing of the recusal application, the handing down of any reserved judgment, and completion of his evidence at an indeterminate date in the future (either before me, or another judge). It was also clear to me that the recusal application, relying as it did (at that stage) on the contents of a judgment in excess of 1100 paragraphs in length, could not be resolved within the next 24 hours or so. Accordingly, I gave Mr de Garr Robinson QC (Leading Counsel for the Post Office at the Horizon Issues trial) the opportunity to take instructions, and then I continued the trial that day, but only to finish Mr Godeseth's evidence. This took, including re-examination, a little less than one hour; I then adjourned the trial and did not require the Post Office immediately to call its next witness, Mr Parker.

17. Directions were necessary for the recusal application. The application was supported by a witness statement by Andrew Parsons, the partner at Womble Bond Dickinson LLP ("WBD") his 14th statement in the proceedings dated 21 March 2019. In fact, earlier that same day the Post Office had also served his 13th witness statement, dealing with an entirely different subject, which was also dated 21 March 2019 although this had not referred to the imminent recusal application. The 13th witness statement was handed up by the Post Office at 10.30 am in court, his 14th witness statement was not mentioned. His 14th statement identified at paragraphs 22 to 25 "findings, or observations" on matters within Judgment No.3 which it was said fell outside the scope of the Common Issues trial. At paragraph 24 his statement said:
"These findings give the clear impression that the Judge has already formed a firm view on these matters. It is to be expected that this will prevent him from taking an impartial view on the same matters when they are revisited, at subsequent trials, with the benefit of full evidence and disclosure".

18. The 14th witness statement also said (at paragraph 25) that the judgment "contains a great deal of critical invective directed at Post Office" and that parts of the judgment "harshly criticise Post Office's witnesses on matters irrelevant to the Common Issues".

19. However, none of the findings, observations, and what were said to be critical invective and/or harsh criticisms were identified in that 14th witness statement. I considered that this identification was necessary for two reasons. Firstly, so that the actual passages could be clearly set out in advance of the hearing of the recusal application itself. Secondly, so that the claimants could take a considered view of the application, whether to oppose it, and whether to serve evidence of their own in response.

20. There was therefore the need for service of a further witness statement by the Post Office; consideration by the claimants of that further statement; provision for service of any evidence in response by the claimants; and then service of skeleton arguments by both parties. Even giving parties 24 or 48 hours for some of these steps, the soonest the recusal application could sensibly be listed was during the week commencing 1 April 2019. I therefore listed it for 3 April 2019. The trial should not, in my judgment, be continued until I had ruled on the recusal application.

21. I therefore made an order that required the Post Office to serve further evidence specifying which passages of the judgment were being referred to in paragraphs 24 and 25 of Mr Parsons' 14th witness statement, and therefore being relied upon to found the recusal application. A 15th statement was served on 26 March 2019, in which a number of passages were identified by Mr Parsons. However, at paragraph 4 of his 15th witness statement he said:
"Post Office's application has been listed for a day. There is therefore a limit on the material that can be referred to in Court within the allotted time. The extracts below are the principal sections of the Judgment on which Post Office intends to rely at the application hearing <u>but it is not an exhaustive list of all the points made in the Judgment that support the Post Office's application. Post Office will also rely in its application, on the structure, tenor and subject-matter of the Judgment as a whole</u>".
(emphasis added)

22. This led to a flurry of inter-solicitor correspondence, of which I became aware at a short hearing on 27 March 2019, listed after the claimants that same morning requested a short hearing to deal with further directions. The claimants took the view that they had to know with full particularity which passages of Judgment No.3 were being relied upon by the Post Office, firstly in order properly to decide whether to oppose the application, and secondly so that they could deal with these points in their own evidence if they did. Mr Green QC explained this at the short hearing, and also submitted that the passage that I have identified above gave the Post Office extraordinary latitude. Mr Cavender QC explained the Post Office's position. Essentially this was that counsel who would be making oral submissions on the application, Lord Grabiner QC, would or may wish to put some passages in context by relying upon other parts of the judgment, and the wording of paragraph 4 of the 15th witness statement of Mr Parsons was to allow him room for manoeuvre to do so.

23. By the time the parties attended before me at 12.15pm on 27 March 2019, WBD had already been told in a letter from Freeths dated 27 March 2019:
"Accordingly, we will proceed on the basis that you will not be relying on any parts of the Judgment to which you have not expressly referred in Parsons 15".
The answer to this came in a letter of the same date from WBD to Freeths which said:

"We have now responded fully to your letter of yesterday. There are no further paragraphs that we wish to identify in accordance with the Order".
This was also orally explained by Mr Cavender QC, and that hearing was transcribed.

24. I did not consider it necessary to make any further directions on the recusal application. Freeths had by the time of the short hearing before me notified WBD that the recusal application was opposed. In any case, any further submissions that the claimants wanted to make concerning any failure to notify passages in advance could be made during the actual recusal application itself. Further evidence from the Post Office in relation to Judgment No.3 was not likely to be particularly helpful, and the expenditure of costs on what could turn out to be satellite litigation could not be ignored. I deal with the matters relied upon by the Post Office in the recusal application at [71] below, after consideration of the law.

25. Later on the same day, 27 March 2019, the court received an agreed Consent Order, signed by both firms of solicitors, seeking to impose a stay on all the proceedings, including but not limited to the Horizon Issues trial, with the exception of the recusal application. I declined to make such an order and explained I would not countenance further orders in the litigation until after the recusal application had been determined.

26. Then on Friday 29 March 2019 both parties lodged written submissions in respect of the costs of the Common Issues trial, and the claimants sought release of the security of £3.9 million which I had ordered be provided by the claimants in September 2018. Oral submissions will be required in due course on both of those matters to deal with the costs of the Common Issues trial, which led to Judgment No.3. I will return to this subject again, but resolving costs in the Common Issues trial cannot be done until after the recusal application has been dealt with.

The legal test for apparent bias

27. The classic statement in respect of the legal test for apparent bias is not in dispute. It is whether:
"the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".
This is taken from [103] of the speech of Lord Hope in ***Porter v Magill*** [2002] 2 AC 357.

28. The parties were agreed on the law, which each side summarised in their skeleton arguments. A large number of authorities were provided in an agreed bundle, and only a few of these were considered in the oral submissions. I will deal with some, but not all, of the 30 different cases provided. The single sentence at [27] above from ***Porter v Magill*** contains the essential statement of the law applicable on any application to a judge that they recuse themselves for apparent bias. Lord Grabiner made clear in his oral submissions that no case on actual bias was being advanced by the Post Office. I shall deal first with the authorities relied upon in the oral submissions, and then some of the others. The legal test is well known.

29. Bias includes giving the impression of having pre-judged any issue. In ***Otkritie International Investment Management Ltd and others v Urumov*** [2014] EWCA Civ 1315 the trial judge had made certain findings against the defendant in relation to two

separate matters, called the Sign-On Fraud and the Argentinian Warrants Fraud. The judge made numerous damaging findings about the defendant's fraudulent deception of his employer, and his conduct both of the interlocutory proceedings and of the trial. He found the defendant personally liable for US$23 million for the Sign-On Fraud and US$150 million for the Argentinian Warrants Fraud. The claimants applied to commit the defendant for contempt, and the defendant applied to the judge to recuse himself. Longmore LJ stated at [1] and [2]:

"[1] It is a basic principle of English law that a judge should not sit to hear a case in which "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that [he] was biased", see ***Porter v Magill*** [2002] 2 AC 357 para 103 per Lord Hope of Craighead. It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concept of bias includes any personal interest in the case or friendship with the participants, but extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have "pre-judged" the case.
[2] This can give rise to potential difficulties in long running cases where a judge has been case-managing a case and has then to conduct the trial or in cases where a trial has occurred and the judge has then to consider consequential matters such as, in the present case, proceedings for contempt. It is obviously convenient for a single judge rather than different judges to deal with a complex case but the question can arise whether there comes a point where findings made by a judge pre-trial disqualify a judge from continuing with a case or findings made at trial disqualify a judge from hearing consequential matters. This is the question at the heart of this appeal."
(emphasis added)

30. In that case, there were five different grounds relied upon by the defendant. The judge treated two of them as apparent bias, and three as assertions of actual bias. He dismissed the first two, but held that although the other three were "entirely groundless", that "with extreme reluctance" he should recuse himself. The Court of Appeal held that he was wrong to do so. At [13] Longmore LJ (with whom Moore-Bick and Laws LJJ agreed) stated:
"There is already a certain amount of authority on the question whether a judge hearing an application (or a trial) which relies on his own previous findings should recuse himself. The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasise, that the issue of recusal is extremely fact-sensitive."
(emphasis added)

31. Longmore LJ also stated the following, explaining why that case was different from an earlier one in which Andrew Smith J had recused himself from hearing an application to commit:

"[30] The present case is different for two quite separate reasons. First as trial judge Eder J has considered an enormous number of issues and sub-issues between the parties. He has not focussed solely or mainly on the very issue that the judge will have to decide on the contempt application; the canvas of his judgment is infinitely broader. The focus of the contempt application will be much narrower and it is (in theory) quite possible that that narrow focus, coupled with the higher standard of proof required for the application, could produce a different result even if the evidence is essentially the same. In any event, the evidence may not be essentially the same.

[31] Secondly, it is clear that Eder J feels no personal embarrassment or discomfort in considering the contempt application. Not only has he not said anything to indicate such embarrassment or discomfort; he has positively said that the fears expressed by Mr Urumov are groundless and that he would welcome his decision (which he reached with "extreme reluctance") being overturned. Since the reasons he gave for his decision are, in my view, defective, overturned it should be.

[32] Usually this court will be astute to support judges exercising what I have called "this delicate jurisdiction" of recusal. But it is also important that judges do not recuse themselves too readily in long and complex cases otherwise the convenience of having a single judge in charge of both the procedural and substantial parts of the case will be seriously undermined. Of course, if the judge himself feels embarrassed to continue, he should not do so; if he does not so feel, he should."

(emphasis added)

32. The point made by Longmore LJ in the passage above is directly applicable to Group Litigation. Such litigation is usually massive in scale, and will almost certainly never be heard in a single trial. Even if test cases are chosen, not all of those may proceed to judgment (individual claims can always be settled) and such litigation is likely to continue for a number of years. I should make it clear that I do not feel any personal embarrassment or discomfort in continuing with this litigation as Managing Judge. It is correct that I halted the Horizon Issues trial on the afternoon of 21 March 2019 and did not require the Post Office to call its next witness, Mr Parker. That was not done through any embarrassment, or fear of being compromised as the trial judge. It was done because it was necessary to hear the recusal application as soon as possible, and it could potentially have been misconstrued by the Post Office at least (if not the fair-minded observer), had I entirely ignored the fact that the recusal application had been issued, and ploughed on with the trial without hearing that application.

33. Earlier in the same judgment, Longmore LJ drew attention to the following, particularly in respect of long trials:

"[18] In long trials where many applications have to be decided in the course of the hearing, a party may persuade himself that a judge is biased against him as a result of his rulings. In ***Arab Monetary Fund v Hashim (No. 8)*** (1993) 5 Admin LR 348, it was suggested that Chadwick J should not continue with the case. He refused to recuse himself and, on appeal, Sir Thomas Bingham MR posed the question whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial was not possible. He continued (pages 354-355):-

> "…Most, if not all, of the cases in which this test has been discussed have been cases of modest dimensions. We know of no case approaching the scale of this where a charge of apparent bias has been made. That makes it the more important to recognise, as we understand to be agreed, that the hypothetical observer is not one who makes his judgment after a brief visit to the court but one who is familiar with the detailed history of the proceedings and with the way in which cases of this kind are tried. We find assistance in observations made in the Supreme Court of New South Wales by Mahoney JA in *Vakauta v Kelly* (1988) 13 NSWLR 502, 513A: "In considering the content of the apprehended bias principle the court must look to, inter alia, two things: what are the norms or standards relevant to the kind of case before it; and whether, on the facts, the requirements have been fulfilled."

Sir Thomas Bingham MR also said this, at p 355:-

> "In a case such as this, in which interlocutory applications proliferate, it may well be that one side fares more successfully, perhaps much more successfully, than the other. There are a number of possible explanations for this, the most obvious being that the successful party has shown greater judgment, determination and knowledge of the rules than its opponent. Mr Ross-Munro accepted, as we understood, that no inference of apparent bias could be drawn from the fact that most, or all interlocutory applications had been decided against Dr Hashim. We agree. He also disclaimed any attack on the correctness of Chadwick J's interlocutory decisions. This we find puzzling. It must, we think, be hard to show consistent unfairness in the absence of consistent error."

(emphasis added)

34. It is important to note that the Master of the Rolls referred to the "reasonable and fair-minded person sitting in court and knowing all the relevant facts". Such an observer is not expected to consider a single element of complex litigation – such as isolated passages in a judgment – and ignore the whole picture. Mr Green for the claimants also drew my attention to what he described as the unique nature of this application, namely recusal of a Managing Judge in Group Litigation which he submitted would inevitably involve trying groups of issues. I do not consider that there is any different test for apparent bias of a Managing Judge in such litigation. In any event parties have sought to have judges managing group litigation recused before. The case of ***A-B and others v British Coal Corporation*** [2006] EWCA Civ 172 (dealt with in more detail below at [49]) concerned potential recusal of a judge who was the approved judge in charge of group litigation. That is effectively the same as the position which I occupy as the Managing Judge.

35. In ***Mengiste v Endowment Fund for the Rehabilitation of Tigray and others*** [2013] EWCA Civ 1003 the Court of Appeal heard an appeal by the claimants' solicitors. They had been made subject to a wasted costs order in favour of the defendants. Given the lex causa of the proceedings was the law of Ethiopia, the claimants had called an expert in Ethiopian law who was given the name (for the purposes of the proceedings) of Mr Jones; this was necessary for security reasons. Mr Jones' evidence was deployed upon a stay application in respect of jurisdiction, in which one of the issues was the fairness of legal proceedings in Ethiopia. The judge who heard that

application took a dim view of Mr Jones' compliance with an expert's duties under CPR Part 35. He was critical of him in his judgment on the stay application. A wasted costs application was mounted against the claimants' solicitors and the judge refused to recuse himself. He heard the application and made such an order against the solicitors.

36. The Court of Appeal considered the matter on appeal. The Post Office relies upon the comments at [59] and [63] in particular in the judgment of Arden LJ (as she then was). The Court of Appeal allowed the appeal against the wasted costs order on the grounds that the judge should have recused himself. It is not necessary to reproduce the whole of [59] which sets out the fact specific matters in both the judge's judgment on the stay application and the criticisms made of the claimants' solicitors, but two passages in particular should be identified:

"[59](i) *No necessity to make the findings:* the judge's criticisms were not in my judgment necessary to enable the judge to evaluate Mr Jones' evidence. The only issue that needed to be decided was whether Mr Jones' evidence should be accepted: the judge held that it should not be accepted because of its inherent inconsistencies and unreliability. The question why his reports contained inadmissible material or he performed poorly as a witness – which I accept were likely to increase costs – were primarily relevant when it came to costs. As it seems to me, the judge, in making criticisms against the solicitors over their explanation to Mr Jones about his duties was concerned to ward off an application for a wasted costs order against Mr Jones (see paragraph 39 of his recusal judgment, above paragraph 34). That was to anticipate an application that had not yet been made. Even if this were not the case, there was no need to make these criticisms without inserting an appropriate qualification that they were provisional views, or views made on the limited evidence available to him, thus being seen to leave the door open to the possibility that there might be another explanation. The fair-minded observer would ask rhetorically why that had not been done.

(ii) *Criticisms expressed in absolute terms*: The judge's failure to leave the door open for the possibility of some explanation when he had not heard evidence or submissions from the appellant solicitors gives rise to an impression of bias because it suggests that no explanation will be considered. The impression of bias is further confirmed by the making of findings of this nature when it can be foreseen that an application for a costs order, with serious consequences for the solicitors, may result."

(emphasis added)

The judgment continued:

"[63] I do not consider that it is necessary for me to produce my own version of the judge's five principles. It was no doubt useful to try to formulate the principles but I do not consider that they are satisfactorily encapsulated in the judge's principles. The first principle does not call for comment. The second principle is that a judge who is doing no more than discharge his judicial function does not create an impression of bias, which is well established. What occurs in that situation is adjudication, not unsought findings. The third principle is in my judgment too narrow since there are circumstances where a judge's criticisms in his substantive judgment will cause him to be disqualified on the grounds of apparent bias from hearing a wasted costs

application: *Re Freudiana*. To call those circumstances "exceptional" does not define them. When there is an issue of apparent bias, the test in *Porter v Magill* must be fearlessly applied by this court. The fourth and fifth principles overlook the possibility that mere criticism expressed in absolute terms may of itself be extreme and unbalanced because the impression to even the fair-minded observer that the door has not been left open for whatever explanation the party or non-party who has not yet had the chance of providing that explanation may have to say. These are immediate observations based on the facts of this case and should not be treated as comprehensive."

(emphasis added)

37. In ***Stubbs v The Queen*** [2018] UKPC 30, the Privy Council heard an appeal from the Court of Appeal in the Bahamas. A trial on charges of murder had taken place in 2007 against three defendants. That trial had to be aborted, but before it was, the judge made rulings on admissibility of evidence and also upon a submission of no case to answer. Another trial in 2013 led to convictions against all three defendants, who appealed. The Court of Appeal heard those appeals in 2015. However, by this stage, the judge who had conducted the aborted trial had been elevated to the Court of Appeal. The defendants invited him to recuse himself on the grounds of apparent bias and he refused. He was part of a court of three, who heard the appeal, which was dismissed.

38. In the course of allowing the appeal from that decision, the Privy Council (per Lord Lloyd-Jones) considered the issue of prior involvement by a judge in a case. At [13] he stated:
"It is obvious that that principle would be violated if a judge were to sit in an appellate capacity to determine the correctness of his own earlier decisions or on an appeal against a conviction in a trial by jury in which he had presided."
However he added at [14]:
"In the present appeals, however, the issue does not arise in this stark form. The question for consideration is, rather, whether the involvement of the judge in an earlier stage of the proceedings should require him to recuse himself. Here, this issue appears in a novel form. Counsel were unable to refer us to any reported authority in any jurisdiction in which it had been argued that a judge who had presided at an earlier trial by jury which had been aborted should not sit on an appeal against a subsequent conviction of a defendant on the same charges in a later trial in which the judge played no part."

39. I consider that this type of prior involvement is some distance from that of a Managing Judge trying separate groups of issues in the same first-instance litigation. At [16] the following was stated:
"[16] A judicial ruling necessarily involves preferring the submissions of one party over another. However, it is obviously not the case that any prior involvement by a judge in the course of litigation will require him to recuse himself from a further judicial role in respect of the same dispute. In the great majority of such cases there will simply be no basis on which it could be suggested that the judge should recuse himself, notwithstanding earlier rulings in favour of one party or another, and there will often be great advantages to the parties and to the administration of justice in

securing judicial continuity. The issue will only arise at all in circumstances where prior involvement is such as might suggest to a fair-minded and informed observer that the judge's mind is closed in some respect relevant to the decision which must now be made. It is not possible to provide a comprehensive list of factors which may be relevant to this issue which will necessarily depend on the particular circumstances of each case. (See generally, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 per Lord Bingham of Cornhill CJ at para 25; *Livesey v The New South Wales Bar Association* (1983) 151 CLR 288 at p 299.) However, relevant factors are likely to include the nature of the previous and current issues, their proximity to each other and the terms in which the previous determinations were pronounced."
(emphasis added)

40. The Privy Council then considered a number of different cases in which particular results had obtained. At [20] the following is stated:
"[20] In *Livesey v The New South Wales Bar Association* (1983) 151 CLR 288 two members of the court hearing professional misconduct proceedings against a barrister had earlier sat in similar proceedings involving the fitness of another person to be admitted to the Bar. The same factual issue featured large in both sets of proceedings. The High Court of Australia held that the judges should have recused themselves from sitting in the second case because of the appearance of prejudgment.

> "It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact. The consideration that the relevant question of fact may be conceded or that the relevant person may not be called as a witness if the particular judge sits would not, of course, avoid the appearance of bias. To the contrary, it would underline the need for the judge to refrain from sitting." (at p 300)"

41. The most relevant passage, in my judgment, is that at [23]:
"[23] Mr Knox is correct in his submission that the fact that a judge has previously made a decision adverse to the interests of a litigant is not, of itself, sufficient to establish the appearance of bias. As Floyd LJ observed in *Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133 (at paras 29, 30), the fair-minded and informed observer does not assume that because a judge has taken an adverse view of a previous application or applications, he or she will have pre-judged, or will not deal fairly with, all future applications by the same litigant. However, different considerations apply when the occasions for further rulings do not arise in the same proceedings, but in a separate appeal."
(emphasis added)

42. This passage is of direct relevance to the matters under consideration here. The Horizon Issues, and all the other groups of issues still to be determined in the whole of the Group Litigation, are the same proceedings as those that led to Judgment No.3. I therefore consider that this authority supports the general proposition that the fair-minded observer does not assume that simply because Judgment No.3 is (in part)

unfavourable to the Post Office, this means that future issues in the litigation, including the Horizon Issues, will not be dealt with fairly.

43. The authorities make clear the type of situation where recusal has been required. At [24] in ***Stubbs*** it is explained that:
"In the present case, during the second trial of the appellants Isaacs J had made rulings on issues of mixed questions of fact and law or involving the exercise of judicial discretion. In particular, first he had ruled against a submission of no case to answer. In doing so he had necessarily concluded that there was sufficient evidence on which a reasonable jury properly directed could convict the appellants. Secondly, he had ruled that Scott's deposition should be admitted in evidence. In doing so he held that the statutory provision under which the application was made was not unconstitutional, that Scott's evidence was sufficiently reliable for it to be in the interests of justice to admit it and that, in the exercise of his discretion, it was fair to admit it. Thirdly, in a further exercise of judicial discretion, he permitted dock identifications of all three appellants. These were concluded rulings on intermediate issues of major significance in the proceedings".
These matters, on the facts of that case, meant that he should not have sat on the appeal, and the fact that there were three justices of appeal and not one did not make a difference to that.

44. The case of ***Steadman-Byrne v Amjad*** [2007] EWCA Civ 625 concerned a personal injury action arising from a low-velocity collision between motor cars. The claimants gave their evidence and were cross-examined in the morning of one day trial. Upon conclusion of their evidence, and over the adjournment at 1.00pm, before the defendant's evidence had even been called, the district judge adjourned and invited counsel for the parties to his room. He then made clear that he believed the claimants as well as making other comments which are listed at [4] in the judgment of Sedley LJ. Some, if not all, of these comments are very remarkable. They are listed at (1) to (13) in that paragraph. What is equally remarkable is that this was done before the defendant had even given any evidence at all.

45. The stance taken by the appellant upon that appeal is summarised at [5] by Sedley LJ:
"The appellant's case is that the judge, by saying what he said, went well beyond giving counsel an initial indication of his thinking and expressed firm views adverse to a defendant whose evidence he had not yet heard. When therefore in his judgment next day he found against the defendant, a reasonable observer knowing what we have recounted would infer that he might well have done so because of a prior prejudice in favour of the claimants and against the defendant."

46. The dicta at [10] deals with a situation where a judge lets the parties know his or her preliminary view before the end of a case:
"The test of ostensible bias is not contentious. <u>It is whether a fair-minded observer informed of all the relevant circumstances would have concluded that there was a real possibility that the judge was biased. Bias in the present context has to mean the premature formation of a concluded view adverse to one party.</u> We put it in this way because it is well recognised not only that a judge may and commonly will begin forming views about the evidence as it goes along, but that he or she may legitimately give assistance to the parties by telling them what is presently in the judge's mind. This may properly include, as it did for example in Jacob J's decision in ***Hart v***

Relentless Records Ltd [2002] EWHC 1984 (Ch) §38, letting the parties know before reaching the defence case that the judge did not think much of the claimant's evidence. What is not acceptable is for the judge to form, or to give the impression of having formed, a firm view in favour of one side's credibility when the other side has not yet called evidence which is intended to impugn it. The appellant says that is what has happened here."
(emphasis added)
I would draw particular attention to the phrase "premature formation of a concluded view adverse to one party". This passage was not specifically cited by Lord Grabiner, but I consider it an important one as the apparent bias test does not prevent a judge from expressing certain views "along the way", as it were. What a judge cannot and must not do is express views that demonstrate he or she has reached a concluded view on something prematurely. To use the expression from ***Mengiste***, the door must be seen to be left open.

47. In ***Re Q (Children)*** [2014] EWCA Civ 918 the judge in care proceedings expressed himself in terms which made clear he accepted the account given by the father and rejected the allegations made by the mother, even though the mother had not yet given evidence. The Court of Appeal allowed an appeal against an order made by the judge, stating that "the judge had strayed beyond the case management role by engaging in an analysis, which, by definition, could only have been one-sided, of the veracity of the evidence and the mother's general credibility" (taken from the summary of the case in ***Stubbs***). This is similar to ***Steadman-Byrne***, because the mother had not even given evidence, but was not made part of the way through the substantive trial, but at an earlier case management stage.

48. Another case relied upon in Lord Grabiner's oral submissions in making the application was ***Locabail (UK) Ltd v. Bayfield Properties Ltd*** [2000] QB 451, a Court of Appeal judgment in a group of five cases all of which concerned the same issues. These cases also concerned the duty and extent of enquiry required of a judge, direct interest in the outcome of proceedings, automatic disqualification and waiver. It is a very well-known case on the subject, and almost all the authorities that follow it refer to it; as a matter of interest, Lord Lloyd Jones who gave the judgment of the Privy Council in ***Stubbs*** appeared in ***Locabail*** as amicus curiae. At [25] in the judgment of the Court of Appeal in ***Locabail***, part of the general discussion and statement of principles before turning to the first of the five cases, the following is stated:
"[25] It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend upon the facts, which may include the nature of the issue to be decided…..
The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case…..
[26] ….It is, however, generally undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should."
(emphasis added)

Paragraph [26] is in the context of matters emerging during a trial in respect of matters within the judge's knowledge in terms of a connection with the case or a party, and disclosures in respect of them. However, I consider that the sentence I have quoted applies generally. Aborting a hearing or trial is undesirable, but does not outweigh the fundamental principle. Also, prior adverse comment on a party or witness, or finding evidence of a party unreliable, would not ordinarily satisfy the apparent bias test.

49. In ***A-B and others v British Coal Corporation*** [2006] EWCA Civ 172 the Court of Appeal heard a renewed application for permission to appeal from a judgment and order of Sir Michael Turner in respect of extremely large-scale group litigation which arose out of claims by coal-miners against British Coal. The claims were for compensation in respect of diseases which they had suffered as a result of their occupation. There were two substantial trials, the first dealing with liability on the part of British Coal, which was resolved in the claimants' favour. The second concerned contribution claims brought by British Coal against their contractors. That second judgment was called ***Benyo*** and concerned a Claims Handling Agreement ("CHA") set up between the claimants and British Coal to resolve their claims. Due to the very high number of claimants, a fast track offer procedure ("FTO") had been set up, after the issue of liability had been resolved, to deal with claimants who were suffering from more serious disabilities, and whose compensation was likely to be of a far higher level than other claimants.

50. However, the contractors raised concerns that the judge, who had been involved in the CHA generally and in approving the FTO, should be the tribunal to resolve the contribution proceedings against them. The contractors had chosen not to attend the hearings when the FTO was developed. The contribution proceedings were in respect of settlements reached under the FTO. The contractors sought to have the judge recuse himself. He refused. At [8] Rix LJ explained that "the single essential point" on the application was whether "the judge has in effect judicially compromised himself, for the purposes of the apparent bias test laid down in recent decisions culminating in ***Porter v Magill*** [2002] 2 AC 357 and ***Lawal v Northern Spirit*** [2004] 1 All ER 187, because of his involvement in the development of the FTO process." He also summarised that point advanced by the claimants in [9] in this way:
"In effect, I think [the contractors'] submission might be put in this way, that the judge has taken a certain ownership in the FTO process itself, which would permit a fair-minded and informed observer to conclude – I am glossing here the apparent bias test – 'that there was a real possibility… that the tribunal was biased'."

51. The contractors' application to appeal the decision of the judge not to recuse himself failed. Rix LJ observed at [12] that "the judge has, for some time now, been the approved judge in charge of this large-scale litigation" and at [13] "it was natural for a judge in charge of group litigation, who would be expected, I think, to have a proactive and not merely passive interest in the litigation with which he is charged as a judge, to assist parties before him in resolving difficulties that they had in working out settlements which they had in mind."

52. I would observe that the CPR generally requires proactivity from the judge in terms of case management. Group litigation in particular, requires the Managing Judge both to case manage and try the substantive issues. Guidance, assistance or proactivity can

take different forms, and explaining (for example) in a judgment that witness statements should concentrate on proper evidence of fact and not contain argument advancing a party's case, could be seen as qualifying as all or any of these. I do not consider that a Managing Judge would disqualify themselves from further involvement in the litigation by doing so, and indeed were they to become so disqualified as a result, it would have a substantial and detrimental impact upon what any Managing Judge could do.

53. Rix LJ also stated at [15] a passage which I consider to be highly pertinent on this particular application by the Post Office:
"[15] Among the matters which the fair-minded and well-informed observer would of course bear in mind, apart from those of which I have already made mention, are the factors that the judge had a responsibility to conduct the group litigation, that he was well into the conduct of that litigation and had great experience in it – and when I refer to that litigation I refer to both aspects of it, both the claim aspect and the contribution proceedings aspect of it….."

54. Auld LJ added further in two passages which I also consider to be highly relevant on this application:
"[18] I agree that the appeal should be dismissed for the reasons given by Rix LJ and wish to add, for the sake of emphasis only, a few words. Where a judge is entrusted to manage and eventually try a group litigation, with all of the complexities and testing of the forensic process that it involves, he is expected to immerse himself closely in the machinery of efficient resolution of the issues raised, and also of other issues that may affect the litigation. Such judicial managerial involvement is of a piece with the new culture of proactive and innovative case management by the court introduced in the 1998 Civil Procedure Rules, having regard, in particular, to the overriding objective. The resultant greater familiarity of the judge with what is required and feasible for speedy and otherwise efficient disposal of a complex matter before him, including a greater professional intimacy with the parties and their concerns than hitherto was normal, may necessitate interchanges and rulings, sometimes indicative, which may, as the litigation develops, require revisiting by him. This may be interlocutory, or in rulings, or a judgment at trial. Judges involved in such an evolving process are expected, and do frequently, have occasion to reconsider their earlier case management directions or rulings, indicative or otherwise, and on occasion provisional expressions of view as to substantive issues which will fall for determination in the case.

[19] To characterise too readily a judge's response in the course of his case-management work of keeping a case under continuous review as conduct at risk of being perceived as bias requiring him to recuse himself could subvert the proactive role now expected of him in group litigation such as this. His earlier decisions in that regard, right or wrong, are such that as a judge he should be expected to revisit them where necessary in an impartial frame of mind and change his mind if he considers it fair and just to do so. Simply because a judge has his capacity for fairness and impartiality tested in that way does not, in my view, bring him within the scope of risk of the test of bias which Mr Limb has prayed in aid as a ground for the judge to recuse himself in this case."

(emphasis added)

55. In ***El Faraghy v El Faraghy*** [2007] EWCA Civ 1149 the Court of Appeal heard what was described by Ward LJ as a "singularly unsatisfactory, unfortunate and embarrassing matter." The judge had made unfortunate comments, which are set out extensively at [17], but one of the features that Ward LJ also considered to be unsatisfactory was explained at [19]:
"When I spoke at the beginning of this judgment about unsatisfactory features of the case, one of them to my mind is the length of delay the Family Division is having to endure in cases of this kind. That is no fault of the Clerk of the Rules nor of the judges assigned to the task of deciding these "big money" cases where millions of pounds are frequently involved. The trouble is that there are simply not enough judges to do this complicated work which takes second place to the children's cases."

56. The decision was to allow the appeal in the particular factual circumstances of that case, and at [31] Ward LJ stated:
"I have given most anxious thought to whether or not I am giving sufficient credit for the robustness of the phlegmatic fair-minded observer, a feature of whose character is not to show undue sensitivity. Making every allowance for the jocularity of the judge's comments, one cannot in this day and age and in these troubled times allow remarks like that to go unchallenged. They were not only regrettable, and I unreservedly express my regret to the Sheikh that they were made: they were also quite unacceptable. They were likely to cause offence and result in a perception of unfairness. They gave an appearance to the fair-minded and informed observer that that there was a real possibility that the judge would carry into his judgment the scorn and contempt the words convey."
Consideration of the remarks by the judge in that case will show how very different that scenario is to the one contained in Judgment No.3. The remarks included what were said to be jokes about flying carpets, Ramadan, shifting sands, Turkish Delight and fasting.

57. In ***O'Neill (No.2) v Her Majesty's Advocate*** [2013] UKSC 36, a Scottish criminal case, Lord Hope at [51] cited ***JSC BTA Bank v Ablyazov*** (dealt with in detail below) with approval, and also stated that the principles of apparent bias are well established, but the application of these principles is wholly fact sensitive.

58. Of the other cases cited but not dealt with orally, some can usefully be summarised. In ***Lanes Group plc v Galliford Try Infrastructure Ltd*** [2011] EWCA Civ 1617 the Court of Appeal heard conjoined appeals in relation to three adjudications, all involving the same parties. The two questions in the appeals were whether the adjudicator had jurisdiction (not relevant to this recusal application) and whether the decision(s) were a nullity on the grounds of apparent bias. Adjudication is a particular form of dispute resolution introduced by the Housing Grants, Construction and Regeneration Act 1996. Enforcement is by way of summary judgment in the Technology and Construction Court, and the first instance decisions had been made by Akenhead J and HHJ Waksman QC (as he then was) sitting as a Deputy High Court Judge.

59. Bias is dealt with at [44] to [62] in the judgment of Jackson LJ. The way the issue arose was because of a document sent out by the adjudicator to the parties entitled "Preliminary View and Findings of Fact". This set out what he said were his provisional conclusions. He had not received Lanes' response to the claim at that

point. It was for this reason that HHJ Waksman QC refused to enforce his decision, even though it was held that the adjudicator had the necessary jurisdiction. At [55] to [57] Jackson LJ held that the material made it clear that the conclusions set out in the Preliminary View were provisional only. The adjudicator's decision was not tainted by apparent bias or apparent pre-determination and would be enforced. He stated:

"[56] There is nothing objectionable in a judge setting out his or her provisional view at an early stage of proceedings, so that the parties have an opportunity to correct any errors in the judge's thinking or to concentrate on matters which appear to be influencing the judge. Of course, it is unacceptable if the judge reaches a final decision before he is in possession of all relevant evidence and arguments which the parties wish to put before him. There is, however, a clear distinction between (a) reaching a final decision prematurely and (b) reaching a provisional view which is disclosed for the assistance of the parties.
[57] In my view the fair-minded observer, with all the admirable qualities identified above, would have no difficulty in deciding this case. He would characterise the Preliminary View as a provisional view, disclosed for the assistance of the parties, not as a final determination reached before Mr Atkinson had considered Lanes' submissions and evidence."

60. It must be remembered that the exercise is a particular fact-sensitive one and will differ from case to case.

61. In ***JSC BTA Bank v Mukhtar Ablyazov*** [2012] EWCA Civ 1551 the judge at first instance had been required to hear, prior to trial, an application to commit one of the parties for contempt of court. He had found a number of contempts proven, which led to Mr Ablyazov being sentenced by him to 22 months' imprisonment. Rix LJ stated the issue on appeal in the following terms at [1]:
"The question raised is whether in doing so the judge put himself out of the running, so to speak, as the judge of the trial on the basis that, by reason of what is called pre-judgment, there would appear to the fair-minded and informed observer a real possibility of bias. This is the doctrine of apparent bias: see ***Porter v Magill*** [2002] 2 AC 357. No one is suggesting that the judge is actually biased."

62. The party affected, Mr Ablyazov, had until early 2009 been the chairman of the claimant bank, JSC BTA Bank, which was situated in Kazakhstan. The bank claimed in different sets of proceedings in the Commercial Court that he had defrauded the bank of US$5 billion by various means. The bank also sought and obtained worldwide freezing orders against him. It is the practice in complex cases in the Commercial Court for there to be continuity of a designated judge for both interlocutory matters and final trial. This is explained in paragraph D4 ("Designated judge") of the Admiralty and Commercial Courts Guide. Teare J was made the Designated Judge. This is similar to the role of Managing Judge in Group Litigation. Prior to the trial, the claimant applied to commit Mr Ablyazov on numerous grounds, but the judge limited the application to three, namely non-disclosure of assets, lying in cross-examination and dealing with assets. These arose as a result of the freezing orders. It was this that led to the sentence of 22 months' imprisonment.

63. The outcome of this is set out at [6] to [8] of the judgment of Rix LJ, with whom Toulson and Maurice Kay LJJ agreed:

"[6] The judge gave three judgments in the committal application: one dealing with the alleged contempts of court, one dealing with sentence, and one dealing with the further consequences for the litigation as a whole, the so-called "unless" judgment. The contempt judgment was handed down on 16 February 2012 ([2012] EWHC 237 (Comm)) and sentence was dealt with by a further extempore judgment given that same day. The unless judgment was given on 29 February 2012 ([2012] EWHC 455 (Comm)).

[7] In his contempt judgment the judge concluded that over the relatively narrow range of matters investigated, Mr Ablyazov had failed to disclose assets, had lied to the court, and had dealt with his assets in breach of the freezing order: and that in defending the committal application had relied on false witnesses and forged documents. The judge said (at [80]):

> "…notwithstanding the clarity and firmness with which Mr Ablyazov gave much, though not all, of his evidence I concluded that I could place little weight on his denials and could only accept what he said if it was supported by reliable contemporary evidence."

[8] In his unless judgment the judge debarred Mr Ablyazov from defending the claims made against him in eight associated commercial court actions and struck out his defences in them *unless* within a stated period he both surrendered to custody and made proper disclosure of all his assets and dealings with them. The order that Mr Ablyazov surrender to custody had been made necessary by his failure to turn up for judgment on 16 February 2012 (although he had said through his counsel that he would). He became a fugitive and had disappeared. The stated period for surrender was until 9 March 2012, and for disclosure until 14 March 2012, save that the sanctions for non-compliance would not take effect until seven days after any dismissal of any appeal".

64. Mr Ablyazov appealed and his appeals failed, the notification of that being on 25 July 2012 with reasons that were reserved. Mr Ablyazov continued to participate in the proceedings. A pre-trial review that had been fixed originally for 13 June 2012 was adjourned with his consent and re-fixed for 2 October 2012. On 26-30 July 2012 the judge heard applications made by both the bank and Mr Ablyazov. The bank sought a declaration that Mr Ablyazov had acted in further default of the freezing order by dealing with his assets, and also sought an order that he reverse certain pledges he had made over valuable properties. Mr Ablyazov requested the court to grant permission retrospectively for such pledges, on the basis that even if made in breach of the letter of the freezing order, they were within its spirit. No suggestion was made that Mr Ablyazov intended to make an application that the judge should recuse himself. On 2 and 3 October 2012 the pre-trial review took place. A detailed timetable was discussed. Leading counsel attended on behalf of Mr Ablyazov. The judge was due to begin his pre-trial reading on 29 October. The recusal application was made only on 19 October 2012, which was before commencement of the trial.

65. The judge rejected the recusal application, both on the basis that Mr Ablyazov had waived his right by reason of his continuing participation, and also on the basis that there was no real possibility of any bias. The Court of Appeal judgment at [36] explained the submissions made on Mr Ablyazov's behalf on appeal regarding his failure to make an earlier application:

"[36] In any event, Mr Béar [counsel for Mr Ablyazov] resisted the idea that there was any obligation on Mr Ablyazov to make an application for the judge to recuse himself in advance of the opening day of the trial itself. In his submission, the moment of truth for such an application, or what Mr Béar described as the "watershed moment", did not arrive until that time. It would only have been different if the judge had expressly raised the question of whether or not the parties had any objection to him continuing as the designated judge of trial. Only that express raising of the issue, or the arrival of the day of trial, could require Mr Ablyazov to make his election. For the rest, it must be assumed, for that was a natural explanation for his silence, that Mr Ablyazov was still in the process of making up his mind whether to object or not."

66. The judgment also considered at [55], in some detail, the case of ***Arab Monetary Fund v Hashim***, and the Court of Appeal's judgment in that case. This case was referred to in the passage of Longmore LJ quoted at [33] above:

"[55] A case closer to the situation of our case was that of ***Arab Monetary Fund v. Hashim*** (CA, unreported, 28 April 1993) where the judgment of the court was given by Sir Thomas Bingham MR. The plaintiff Fund was seeking to recover $50 million which it alleged that its former director-general, Dr Hashim, had misappropriated from it. That action also began, as such actions generally do, with a world-wide freezing order. Hoffmann J became the designated judge. Dr Hashim complained to the Vice-Chancellor that in the course of interlocutory applications the judge had made up his mind against him. The Vice-Chancellor considered that there was no ground for that complaint at all, but as a matter of indulgence directed that while Hoffmann J should continue to hear interlocutory applications, a different judge would conduct the trial. Hoffmann J was then appointed to the Court of Appeal and Chadwick J took his place as designated judge. He conducted the pre-trial review and was subsequently 7 days into the trial when Dr Hashim drafted a letter to the Lord Chancellor to have him removed on the ground of apparent bias. However, the letter (which in being directed to the Lord Chancellor was misconceived) was never sent, apparently on legal advice. The trial continued for several more weeks, and then Dr Hashim applied to the judge to recuse himself on the ground of apparent bias. The opening weeks of the trial had been dogged by numerous further interlocutory applications, and Dr Hashim was concerned with the result of them. But he was also concerned with a remark which the judge had made in another case and which had been reported to him. Chadwick J refused to recuse himself, and his judgment was appealed.

[56] This court refused to give permission to appeal, but considered the application in a full judgment. In the course of that judgment, Bingham MR said this:

> "In accordance with the practice now adopted in cases of this magnitude, a judge was assigned to deal with the string of interlocutory applications which were expected before trial. Such an arrangement has the obvious benefit of avoiding the wasteful duplication of time and effort necessarily involved if a series of different judges has to master the pleadings, issues and previous history of a complex case. <u>But such an arrangement is intended to have an additional benefit: that the judge, being familiar with the case as it develops, will play a creative and directional role, concentrating attention on the issues which matter, discouraging unnecessary interlocutory diversions and highlighting the apparent strengths and weaknesses of the parties' respective cases</u>."

Bingham MR went on to say:

> "Would a reasonable and fair minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible? Most, if not all, of the cases in which this test has been discussed have been cases of modest dimensions. We know of no case approaching the scale of this where a charge of apparent bias has been made. That makes it the more important to recognise, as we understand to be agreed, that the hypothetical observer is not one who makes his judgment after a brief visit to the court but one who is familiar with the detailed history of the proceedings and with the way in which cases of this kind are tried. We find assistance in observations made in the Supreme Court of New South Wales by Mahoney JA in ***Vakauta v. Kelly*** (1988) 13 NSWLR 502 at 513A."
>
> (emphasis added)

67. A passage at [70] is in my judgment highly notable. It deals with the position where a judge has to deal with applications for committal. However, I consider the principle is of wider application:
"In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not "pre-judging" by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case (as may properly occur in the situation discussed in *Ex parte Lewin*, approved in *Livesey).* He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias. I refer to the helpful concept of a judge being "influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case" (*AF (No 2)* at para [53]). I have also found assistance in this context in Lord Bingham's concept of the "objective judgment". The judge has been at all times bringing his objective judgment to bear on the material in this case, and he will continue to do so. Any other judge would have to do so, on the same material, which would necessarily include this judge's own judgments."

(emphasis added)

68. In that case Mr Ablyazov waited some time before making his application for recusal. The most relevant passages in respect of waiver are those at [77] to [93]. The Court of Appeal first considered ***Locabail (UK) Ltd v. Bayfield Properties Ltd*** [2000] QB 451, the group of cases all of which concerned the same issue. One of the cases, called ***Locabail*** itself, concerned a disclosure by a deputy judge who was hearing a particular case. This is a part-time judicial post, occupied by practising barristers and solicitors. The deputy judge, who was a senior partner in a large firm of solicitors, learned in the course of the proceedings that his firm was acting in ancillary litigation. He disclosed this to the parties before him. Mrs Emmanuel, one of those parties, raised no objection until judgment was given against her. Her silence in the face of disclosure was held to be a waiver. Rix LJ at [78] said "Perhaps I should emphasise that that was silence added to participation in the proceedings."

69. At [88] of ***Ablyazov*** Rix LJ said:

"However, be that as it may, the question arises whether Mr Ablyazov's failure to request recusal at all times from the February judgments down to 19 October 2012, and in particular as late as the pre-trial review of 2 October 2012, while still participating in the proceedings, is consistent with a subsequent request for recusal based in essence on the February judgments."

70. The passage continued, analysing what Mr Ablyazov had done and how he had continued to behave in the litigation:

"[89].....In the present case, there was no mere silence, but participation in proceedings before a judge whom it was known, on Mr Ablyazov's own case, had conducted himself in such a way as to give rise to the appearance of bias. Moreover, there was a duty to speak, arising out of Mr Ablyazov's duty to help the court to further the overriding objective (CPR 1.3). It was contrary to that duty to allow the court and the other parties to waste time and resources in preparing for a trial which, if the judge of trial had to be replaced, could not start on the fixed date, but would have to be adjourned, in all probability into the following year with uncertainty as to when it could be re-fixed. The situation was similar to the familiar case where some disclosure is made to the parties by the judge, and there is no request to the judge to recuse himself. In the present case the disclosure, on Mr Ablyazov's own analysis, came at latest with the judge's three judgments of February 2012 in the committal proceedings. It may be asked, what more was required of the judge, by way of disclosure, in the light of Mr Ablyazov's own grounds for alleging apparent bias? It is unrealistic to suggest that the judge had to go on to ask whether there was any objection to him remaining the judge of trial.
[90] Mr Béar submits that the watershed moment had not yet arrived, before the start of the trial itself. There is no authority to that effect. It may often happen, of course, that some disclosure is made at the start of a trial. But equally often, some disclosure is made in advance of trial, as soon as the judge realises from reading the papers that there is something which he considers needs to be disclosed. In the present case, however, the relevant disclosure, on Mr Ablyazov's own case, came at latest in the judge's February judgments. It was then for Mr Ablyazov to state his position."
(emphasis added)

71. A similar question could be posed in the instant case. The Post Office relies squarely upon the contents of Judgment No.3. That was provided to the Post Office in draft on 8 March 2019. The Post Office has different counsel teams acting on the Horizon Issues trial, and the Common Issues trial. There was not merely silence from the Post Office, but there was silence combined with active participation in the Horizon Issues trial. That active participation continued up to, and indeed during the day of, 21 March 2019 when the recusal application was issued.

72. A further passage in the authorities that deal with waiver occurs at [17] in ***Steadman-Byrne v Amjad.***
"We would, however, stress that the time to draw the attention of a tribunal to a clear manifestation of bias on its part is ordinarily when it occurs. There is no reason why a judge to whom it is courteously pointed out that he or she may have overstepped the mark should not accept that it may be so and stand down. Equally, however, it is only in a clear case that an advocate can responsibly take this course and a judge accede to it, both because such applications have been known to be made opportunistically and

because of the expense that a recusal will inevitably throw upon one or both parties, neither of whom will ordinarily be to blame for what has happened. The law of waiver is not simple, but appellate and reviewing courts tend not to look favourably on complaints of vitiating bias made only after the complainant has taken his chance on the outcome and found it unwelcome."
(emphasis added)
It might be thought that the Post Office had taken their chance on how the evidence of fact in the Horizon Issues trial unfolded by waiting until the last day of that evidence before issuing the recusal application.

73. There were two communications received from the Post Office after distribution to the parties on 8 March 2019 of the draft of Judgment No.3. One was a point in relation to the cross-examination of Mrs Stockdale, sent at 1426 hrs by e mail on 11 March 2019 (and received after court hours that day); the other was the list of typographical and other corrections, which also included submissions that the Post Office's case on (for example) Branch Trading Statements had not been accurately summarised in the draft. No submissions were received by the court inviting reconsideration or removal of, or drawing attention to, any of the passages relied upon in this recusal application on the basis that they risked, even arguably, giving rise to apparent bias.

74. I do not consider it is necessary individually to analyse the full text of all the authorities, particularly if they are referred to in other cases. The Post Office relied upon ***Locabail (UK) Ltd v. Bayfield Properties Ltd*** [2000] QB 451 and that is considered above and in ***JSC BTA Bank v Mukhtar Ablyazov. Locabail*** does however state at [25] that the answer will in most cases be obvious.

75. In ***AWG Group Ltd v Morrison*** [2006] EWCA Civ 6 the judge who was about to hear a trial estimated to last six months realised, one week before the trial, that one of the witnesses was a long-standing family acquaintance. The defendants applied to the judge that he recuse himself. Instead of doing that, he acceded to the claimants' suggestion that they would not call the witness, but instead deal with the area dealt with in his evidence by calling other witnesses. In the course of upholding the defendants' appeal, the Court of Appeal dealt with the impact upon the organisation of the courts of the judge deciding to recuse himself. It was stated at [29] in the judgment of Mummery LJ that the judge's concerns about his prejudicial withdrawal from the trial and its effects upon the parties and the administration of justice were "totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification of the judge".

76. I entirely agree, and am of course in any event bound by that decision. Disruption to the administration of justice is irrelevant to the crucial question of the real possibility of bias. The situation in the Post Office litigation is, however, different to that of a judge realising, in pre-trial reading, that he is closely acquainted personally with an important witness. Firstly, this is not a question of the automatic disqualification of the judge on the grounds of personal involvement with a witness, whose association with the claimant during a corporate takeover was central. Secondly, the administration of justice here does not concern re-organisation and reallocation of another judge to hear a particular trial, even a trial intended to last for as long as six months. It concerns the Managing Judge of Group Litigation who has handed down

Judgment No.3, as well as the Horizon Issues trial currently underway, and is based firmly on the actual content of Judgment No.3, and passages of it with which the Post Office is unhappy. That does not mean that the stage the proceedings have reached is determinative of the application. However, in a fact-sensitive inquiry, it cannot be ignored that the unheralded application came towards the very end of the Post Office having called almost all of its witnesses of fact in the Horizon Issues trial. Ward LJ said in ***El Faraghy*** at [32]:

"It is an embarrassment to our administration of justice that recusal applications, once almost unheard of, are now so frequently coming to this Court in ways that do none of us any good. It is, however, right that they should. The procedure for doing so is, however, concerning. It is invidious for a judge to sit in judgment on his own conduct in a case like this but in many cases there will be no option but that the trial judge deal with it himself or herself. If circumstances permit it, I would urge that first an informal approach be made to the judge, for example by letter, making the complaint and inviting recusal."

(emphasis added)

77. I took the view that I ought to hear the application, and the Post Office did not seek to have it heard at first instance by another judge. In my judgment, given the subject matter of the litigation and the fact that the application was made in the very middle of the ongoing Horizon Issues trial, there was no option but to hear it myself.

Particular Features of the Recusal Application

78. The fair-minded and informed observer would consider all the relevant facts. I consider that the Post Office in this recusal application overlooks a significant number of material facts, and instead, concentrates upon isolated passages and takes them out of context. There are three main areas in which this is done. I shall deal with each of them before considering the individual passages in the 15th witness statement of Mr Parsons. The recusal application also misconstrues the Common Issues as dealing solely with matters of contractual construction. That is not correct, as some of the Common Issues expressly deal with agency, and also the Branch Trading Statement, which is a feature of how SPMs account to the Post Office. This is not a criticism of Lord Grabiner, as he made it clear that he had come to this case relatively recently and had to be brought up to speed very quickly. However, in order properly to understand some of the passages upon which reliance is placed by the Post Office, it is necessary to consider the way in which the Common Issues trial was conducted by the Post Office.

79. The authorities make it clear that on an application such as this a wholly fact sensitive inquiry is required. Because the Post Office rely on so many passages, in what is a very long judgment in any event, this means that the judgment on this application is itself somewhat long. That is an unavoidable result of the Post Office's reliance on 109 separate passages in Judgment No.3.

Credit of witnesses

80. The first main area overlooked by the Post Office on this application is the way during the Common Issues trial (that led to Judgment No.3) that the Post Office chose to deal with the evidence, and in particular the credit, of each of the six Lead Claimants. Lord Grabiner submitted that the result of Judgment No.2 put the Post Office "in a quandary" and it did not want to allow the evidence of the six Lead

Claimants to go unchallenged, and therefore it cross-examined upon it. Judgment No.2 concerned an application by the Post Office to strike out a great deal of the Lead Claimants' witness statements, issued shortly before the Common Issue trial. That application failed. The description of the position in which the Post Office found itself as "a quandary" may summarise the background thinking at the Post Office to the tactics adopted in the Common Issues trial, but it does not mean that material becomes irrelevant because the Post Office wishes matters had turned out differently.

81. I deal with this topic in more detail below when considering the separate passages relied upon by the Post Office, but the general point can be made when considering Mr Abdulla's evidence as an example. There were factual issues concerning his contract formation that had to be resolved. The Post Office expressly chose to cross-examine him on his accounting at his branch, the results of the audit performed at his branch that led to his suspension, the shortfalls that audit was said to show, and a suspension interview conducted by Mrs Ridge. It was expressly put to him that he was lying, that he had committed a criminal offence of false accounting, and had admitted that offence at the interview with Mrs Ridge. All of this was done by reference to contemporaneous documents, including the transcript of the suspension interview. It was expressly put to him that he made untrue declarations in order to mislead the Post Office. He was questioned about training and the Horizon user guides. At the end of his cross-examination, the following point was formally put to him:
"Q: I have put to you that you have falsified your declaration to Post Office and you have done so deliberately. You have signed a Statement of Truth on your witness statement: the contents of that statement are true.
What I am going to say his Lordship at the end of this trial is, as you are capable of falsifying your declaration on your accounts, you are just the sort of person who would falsify a declaration on a witness statement so you shouldn't be believed.
A. That is not true."

82. There is nothing wrong in putting such a point to a witness, if that was the Post Office's case, which it was. Indeed, if that is a party's case, such points *must* be put to the witness on behalf of the Post Office. However, if there are factual issues about contractual formation, and the Post Office's case is that the witness is lying, by putting such points in issue, the trial judge has to resolve these. This is not going outside the Common Issues trial; it is part of the judicial function of resolving those issues. The cross-examination inextricably wove into the issue of the credit of Mr Abdulla, all of the matters which Lord Grabiner would now have me (or a fair-minded informed observer) conclude were *outside* the scope of the Common Issues trial, such as audit, suspension, termination, training and the Helpline.

83. I expressly at [269] in Judgment No.3 made it clear that I was making no criticism of Mr Cavender in putting such points. In the Post Office's written Closing Submissions, it was expressly said at paragraph 592 that Mr Abdulla had "lied frequently and brazenly". However, in his closing oral submissions, Mr Cavender said that I should make no findings as to credit. This was a confused position. I therefore gave the Post Office the opportunity to consider its position on this, and provide written submissions after the trial ended, clarifying what its submissions were. It did so, and this subject is dealt with at [21], [57] and [58] of Judgment No.3. At [58] to [60] I stated the following:

"[58] That was a plainly confused position on the part of the Post Office. After a degree of exploration during oral closings, this confusion was not resolved. I therefore invited the Post Office to clarify their position on this after the hearing in writing. This was done, and the Post Office submitted that "the Court should refrain from making any findings of fact on matters going to issues outside the scope of the Common Issues trial, specifically matters going to issues of breach and causation."

[59] I accept that the correct approach is not to make any findings on issues of breach, causation, or loss upon what were called Horizon Issues, which effectively deal with the operation and accuracy of the Horizon system, and whether it is robust and/or whether it had the propensity to generate errors and shortfalls.

[60] The Post Office is obviously concerned that findings of fact in this judgment may affect its prospects during any future trial on breach and causation. I will not be making any findings of fact in this judgment that go to contested facts that will be dealt with as part of breach or causation. However, that is not the same as saying that the court cannot and should not deal with the credit of witnesses where this has been so directly challenged by the Post Office."

84. The written clarification to which I referred from the Post Office withdrew two sentences of the Closing Submissions in respect of Mr Abdulla. These were in paragraph 592 of its written Closing Submissions. However, the final version of those submissions therefore looked like this, with the withdrawn sentences struck through:

"592. The central fact about Mr Abdulla's evidence cannot be avoided: he lied frequently and brazenly. He began by denying that, as his interview records, his previous experience included tallying up figures. He then claimed that he read the first and second paragraphs of a letter, and then what appeared on its second page, but missed out the (from his perspective, damaging) third paragraph. He then said that a disclaimer meant that he would not have paid any real attention to a contract summary. He first claimed not to have read any of the transfer day documents, then admitted he did read the key document. He claimed that it was "definitely true" that Christine Adams and Christine Stephens were the same person, and that it was "not possible" that they were two people. ~~He doesn't believe it was wrong to have told Post Office he had cash in the branch when he did not, and to have instead put an undated cheque in the till in case he was caught. Indeed, he says that he would falsify the accounts again.~~ He said that he was given the impression in the interview held following the revelation of his wrongdoing that if he paid back the money he would be reinstated; that was untrue, as the transcript showed. He claimed to have called the Helpline very frequently, then, when the call logs were put to him, said that in fact he gave up and stopped calling. And he claimed to believe this was all a conspiracy to eject him from his branch."

85. It can be seen that this submission therefore retains:
1. The assertion that he lied frequently and brazenly;
2. Submissions upon the suspension interview, including that what he said was untrue and this was shown on the transcript;
3. Submissions upon his experience of the Helpline;
4. Submissions in respect of the call logs of the Helpline, that had been put to him.

86. This meant that Mr Abdulla's credit had to be considered by me. It was expressly put in issue by the Post Office. I consider that not only to be the correct approach, but to be the approach required by any trial judge who is asked to determine factual issues about contract formation when a Lead Claimant's credit has been subject to this kind of challenge. All of the Lead Claimants were subject to attack on credit, although obviously the facts were different between them. Two of them, Mr Abdulla and Mrs Stockdale, were expressly accused of criminal offences.

87. Lord Grabiner submitted that Judgment No.3 went too far in making findings as to credit, and used as an example [123] of Judgment No.3, when I stated the following in respect of Mr Bates:
"I find that his evidence was careful, and he was an honest, thorough and reliable witness."

88. However, his submission glossed over two matters. Firstly, the summary of the attack on Mr Bates' credit at [121], which said:
"[121] In the Common Issues trial the Post Office cross-examined Mr Bates, and made submissions about the quality of his evidence, in robust terms, as it is entitled to do. No litigant is obliged to accept the factual evidence against it, and is entitled to test and challenge that evidence when it is in dispute, and that is what the Post Office did. Mr Bates' evidence that he did not receive a copy of the SPMC with the Letter of Appointment was described as implausible, and his assertion in this respect was said to be wholly unconvincing. Because he was a details man (he had once complained of a modest under-delivery of stamps) it was said he would surely have noticed the SPMC was not in the same envelope. He was subjected to a sustained attack. Other terms used by the Post Office to describe his evidence were risible, meaningless, nonsensical and weak. It was said he was giving evidence that was plainly wrong, but had convinced himself of the truth of his own account after years of campaigning."

89. These were the submissions in fact made by the Post Office based upon its cross-examination of Mr Bates. There were factual issues concerning contractual formation between Mr Bates and the Post Office, in particular which documents he had been sent, which had to be resolved to decide which contractual terms governed his relationship with the Post Office. Those factual issues could not be decided without deciding Mr Bates' credit as they partly relied upon what documents were sent to him prior to contract formation, and what he said he had actually received, which was expressly challenged.

90. The second point that is glossed over is that I expressly made it clear in Judgment No.3 that making a favourable finding in Judgment No.3 did not mean that everything a particular claimant may say in later evidence would be accepted. This was contained in [60] when I stated:
"A finding, say, in Mr Bates' favour on issues of fact such as whether he received a copy of the SPMC has to be made one way or the other, as that affects the formation of contractual terms in his case. That is not however (if that finding is in Mr Bates' favour) to say that thereafter and for all time in these proceedings everything that Mr Bates says in evidence will as a result be accepted uncritically by the court on future other issues".

91. Finally, by cross-examining on matters such as audit, suspension and termination, the Post Office had put in issue what in fact had occurred, which meant that (as an example) Mr Green was entitled to cross-examine Mrs Ridge about Mr Abdulla's suspension interview. The Post Office on the recusal application portrayed this as cross-examination by the claimants on irrelevant material, which was then wrongly taken into account in Judgment No.3. I do not consider that analysis to be correct. It was directly relevant, and was made directly relevant by the fact it had been used by the Post Office in its own cross-examination earlier in the trial. What occurred at the suspension interview was put expressly in issue by the Post Office itself.

92. *Phipson on Evidence* (2013) 18th ed. Sweet & Maxwell states at 1-03 that "the two key objectives of the rules of evidence are fairness and ascertaining the truth through accurate fact finding". I do not consider that it would be correct or fair for Mr Cavender to have been allowed to cross-examine Mr Abdulla in the way he did, using the material that he did, yet to have prevented Mr Green from cross-examining Mrs Ridge on the same interview, or the facts underlying that interview. In any event, no objection was taken at the time by the Post Office to Mr Green's cross-examination, nor do I consider it sensibly could have been.

Extent of findings

93. In many places in Judgment No.3, not simply the passages I have quoted at [83] above in this judgment, I made it clear expressly that I was not making any findings as to breach, causation or loss, nor was I making any findings on the Horizon Issues. This point was made several times, including at [35], [62], [168], [193], [270], [328], [361], [480], [518] and [1113] of Judgment No.3.

94. I consider those points – or rather, the same point, made multiple times – are entirely clear and unambiguous. Lord Grabiner was rather dismissive of this. He referred to this as a "mantra" in respect of which he said:
"That form of words, in my respectful submission, would appear to the fair-minded observer to be aimed at pre-empting the substantive criticisms that I have been making throughout. It is just a mantra which would not convince the observer that your Lordship had not prejudged the issues which still fall to be tried by your Lordship."

95. I do not accept that submission. It suggests some remarkably convoluted thinking on the part of the court, including an awareness in advance that an application to recuse for apparent bias might be made, and a conscious attempt to head that off, but doing so in terms which "would not convince the observer" that I had not prejudged the issues, in respect of which I was expressly stating that I was *not* making findings. It also suggests convoluted thinking on the part of the fair-minded observer.

96. I consider that the fair-minded and informed observer would take those statements in Judgment No.3 at their face value, and correctly conclude that I was not making findings on breach, causation, loss or the Horizon Issues. It should also be noted that the Post Office had expressly invited me in its submissions not to make findings going to breach and causation, an invitation that I expressly adopted. I consider the submission at [94] above that this was merely "a mantra" – by which term Lord Grabiner seemed to mean meaningless repetition, rather than a chant –

mischaracterises what was clearly stated in Judgment No.3.

The National Federation of Sub Postmasters or NFSP

97. Part F of the judgment dealt with the relationship between the Post Office and the NFSP. Mr Beal was in charge of relations between the NFSP and the Post Office.

98. Included within this subject was the evidence of Mr Beal, whom Lord Grabiner said I had unfairly criticised in terms of his subjective belief concerning the contractual effect of the NTC, the contract form which replaced the earlier SPMC. He also submitted that the NFSP had not been represented before me and that it was effectively unfair to have criticised that body in those circumstances.

99. Each of these submissions are wholly out of context and pay no attention either to the evidence submitted by the Post Office itself in the Common Issues trial, or to the way that the NFSP formed part of the Post Office's own case on the Common Issues.

100. Mr Beal had expressly given evidence in his witness statement concerning his subjective belief about the terms of the NTC. The NTC came about as part of the Network Transformation or NT Programme. At paragraph 33 of his witness statement Mr Beal had said:
"Post Office changed the suite of standard contracts for the purpose of the NT programme. Despite the changes, the core principles of the agent being responsible for running the branch, employing assistants, completing the accounts and liability for losses remained the same."
(emphasis added)

101. I rejected this evidence. Lord Grabiner's submission is essentially that it was unfair criticism of Mr Beal not to have accepted his evidence. I do not consider that submission to be correct. I deal with the two different sets of terms in the SPMC and NTC at [230] below, but on their plain terms, the liability of a SPM for losses are not the same in the two contracts, and I do not accept that they can sensibly be said to be the same. The SPMC expressly requires fault on the part of the SPM, and the NTC expressly and obviously does not. It uses far wider words and expressly states that a SPM is liable for "any loss of or damage to, any Post Office Cash and Stock (however this occurs…..)".

102. Lord Grabiner was very clear about Mr Beal's evidence. I asked him about Mr Beal's witness statement and the passage dealing with it which I reproduce at [100] above. He submitted the following:
"LORD GRABINER: My response to that is first of all it obviously was in the witness statement but it was irrelevant to the matters in the trial.
MR JUSTICE FRASER: Understood.
LORD GRABINER: And whatever came out of the cross-examination was similarly irrelevant."

103. There are three points that arise out of this. Firstly, this was the Post Office's own evidence which Lord Grabiner now submits was irrelevant to the Common Issues trial. This was not the stance of the Post Office when it called this evidence. Secondly, Mr Beal's subjective understanding of the meaning of the loss provisions in the NTC is irrelevant in law for the purposes of construing the terms. However, he was called

to give evidence of a number of matters, including this. The Post Office called this evidence on his subjective understanding and I rejected it. This is part of what a trial judge is entitled to do. Thirdly, it was also relevant because Mr Beal gave evidence on the Post Office's relationship with the NFSP. That was part of why he was called as a witness too. The fact that I disbelieved him on paragraph 33 of his witness statement was not irrelevant to my analysis of the weight to be given to his other evidence, for example where he said at paragraph 44 that "the NFSP…..is an independent members' organisation supporting Subpostmasters" and at paragraph 45 "The NFSP is independent of Post Office". Both of these passages were in his evidence in chief. He gave positive evidence of the independence of the NFSP.

104. The independence of the NFSP was part of the Post Office's express case on the Common Issues, as well as in the litigation generally. The relevance of both is identified at [575] in Judgment No.3, which states (at [575](2)):
"2. The Post Office's case is that there is what it called an "interpretative spectrum" of contracts, ranging from sophisticated contracts which have been carefully negotiated and/or professionally drafted at one end, to more informal contracts at the other. The Post Office submits that the SPMC and the NTC are at the "more sophisticated" end of that spectrum. So far as negotiation of the terms is concerned, the Post Office relies upon the fact that the negotiation of the terms of the NTC was done between the Post Office and the NFSP, as though they were parties in a commercial bargaining position at arm's length from one another."
(emphasis added)

105. The bargaining position of the respective parties was a directly relevant issue to some of the Common Issues. The role of the NFSP was integral to that on the Post Office's own case, which was that the NFSP was independent of it.

106. Further, the NFSP was expressly relied upon in the Post Office's written Closing Submissions concerning the imposition of implied terms at paragraph 345. The Post Office submitted:

"345. Neither of those tests [ie for implied terms] is met as regards changes made with the agreement of the NFSP, a body tasked with protecting the interests of SPMs. The contract itself provides an express "control mechanism" (namely, the need to obtain approval from the NFSP), and this precludes any implied restriction. In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland* [2013] B.L.R.265 at para. 139, Lewison LJ stated as follows: "Where the contract itself expressly provides the control mechanism, especially where the control mechanism is an objective test, there is no warrant for implying a different one"

346. It is an objective test whether or not the NFSP has granted its approval for a change, and there is nothing incoherent (whether practically or commercially) in the parties agreeing to such a control mechanism, to the exclusion of any implied restriction. If the parties had been asked at the time of contracting whether changes agreed by the NFSP were subject to any additional restriction, they would not have replied with a terse "of course" but with confusion as to why any further restriction would be necessary. The NFSP could be expected to block any highly controversial change, leaving it to Post Office to decide whether or not to impose the change or any

similar change without the benefit of agreement (in which circumstance the implied restriction will apply)."

(emphasis added)

107. I consider that it is unarguable, given these submissions made by the Post Office on the Common Issues themselves, that consideration of the independence of the NFSP, or lack of it, was centrally included within resolution of the Common Issues. It was expressly part of the Post Office's own case. The Lead Claimants' case was that the NFSP was not independent. This was an issue that had to be resolved.

The Post Office's case on the Common Issues

108. The parties could not agree on the factual matrix within which the contractual terms fell to be construed. Findings were therefore necessary in this respect. The case for the Post Office is best summarised at Paragraph 76 of the Generic Defence which pleaded the following in terms of the factual matrix. These paragraphs state as follows:

"B.1 Factual Matrix

76. Post Office asserts that the following matters are important aspects of factual matrix against which the various Subpostmaster Contracts relied on by the Claimants should be construed.

(1) Subpostmasters typically stood to benefit from the relationship with Post Office in at least two respects: first; by obtaining remuneration in accordance with their Subpostmaster Contracts and, second, as a result of offering Post Office services in the Subpostmasters' premises, by enjoying increased footfall and revenue for the retail business that Subpostmasters typically operated alongside the Post Office business.

(2) Subpostmasters contracted with Post Office on a business to business basis and in the expectation of profiting from the business relationship as noted above.

(3) Subpostmasters were under no obligation and no pressure to contract with Post Office on the terms that it offered or at all.

(4) Post Office was unable to monitor at first hand the transactions undertaken in branches on its behalf, in relation to which it was liable to Post Office clients. <u>These transactions and the manner in which they were carried out were the responsibility of the relevant Subpostmasters.</u>

<u>(5) Post Office was unable to monitor at first hand the custody and use of its property (principally, cash and stock) in branches. Again, these matters were the responsibility of the relevant Subpostmasters.</u>

<u>(6) Post Office relies on the accurate reporting by Subpostmasters of accounts, transactions and the cash and stock held at the branch. Should Subpostmasters not accurately report these things, it would be impossible or alternatively excessively difficult to determine (i) if a shortfall has occurred, (ii) when it occurred and/or (iii) why it occurred.</u> See further paragraphs 68 and 69 above.

(7) Given the nature of Post Office's business and the variety of transactions and processes required for the operation of a Post Office branch, it would be impracticable for all of the parties' rights and obligations to be set out in a single contractual document. It was to be expected that Post Office would rely upon manuals and other documents containing instructions."
(emphasis added)

109. Paragraph 93 of the Generic Defence stated

"93. Post Office notes that the Claimants' case set out in paragraph 55 applies only to Section 12, Clause 12 of the SPMC. More generally, as regards shortfalls disclosed in a Subpostmaster's accounts, Post Office notes the following principles, each of which applies to Subpostmasters:

(1) Where a Subpostmaster asserts that he or she is not responsible or liable for a shortfall, the legal and/or evidential burden of proof is on him or her to establish the factual basis for such assertion, in that:

(a) In the absence of evidence from a Subpostmaster to suggest that a shortfall arose from losses for which he or she was responsible, it is appropriate to infer and/or presume that the shortfall arose from losses for which he or she was responsible. Such an inference and/or presumption is appropriate because (1) branches are under the management of Subpostmasters or their Assistants, (2) losses do not arise in the ordinary course of things without fault or error on the part of Subpostmasters or their Assistants and (3) it would not be right to infer or presume that a shortfall and loss was caused instead by a bug or error in Horizon.

(b) Subpostmasters bear the legal burden of proving that a shortfall did not result from losses for which they were responsible. This is because (1) the truth of the matter lies peculiarly within the knowledge of Subpostmasters as the persons with responsibility for branch operations and the conduct of transactions in branches, (2) it would be unjust for Post Office to be required to prove allegations relating to matters that fall peculiarly within the knowledge of Subpostmasters and/or (3) where a person is subject to a fiduciary obligation as regards his or her dealing with assets, the burden is on that person to establish the justification for his or her dealings.

(2) Where an agent renders an account to his or her principal, he is bound by that account unless and to the extent that he discharges the burden of demonstrating that there are mistakes in the account that he should be permitted to correct.

(3) Where an agent deliberately renders a false account to his or her principal, in relation to the matters covered by the account the Court should make all presumptions of fact against that Subpostmaster as are consistent with the other facts as proven or admitted."

(emphasis added)

110. These passages of the pleading were directly relevant to Common Issues 12 and 13 dealing with SPMs and agency. It can be seen in particular in respect of paragraph 93(1)(b) of the Generic Defence above, that matters the subject of that plea, cannot sensibly be said not to be relevant to the Common Issues. Further, in respect of

Common Issues 8 (dealing with liability for losses under the SPMC) and 9 (liability for losses under the NTC), the Post Office expressly submitted in its written Closing Submissions that:

"Issues 8 and 9 concern the proper approach to responsibility for losses. They should be considered against the factual background of how accounting works in a Post Office branch, as described by Angela Van Den Bogerd at paras 73 to 82 and 126 to 140 of her witness statement."

(emphasis added)

111. Finally in terms of this, in the Post Office written Opening Submissions for the Common Issues trial, paragraphs 17 onwards stated that the:

"17…. "Post Office does not have a day-to-day presence in the branches. It relies on SPMs to accurately conduct and record transactions and to take proper conduct of Post Office's cash and stock. Post Office is exposed to the full range of frauds (both determined schemes and those instances of false accounting which begin as relatively innocent attempts to make the numbers work). It is also exposed to SPMs' error, and to fraud or errors by assistants (whom only the employing SPM is in a position to supervise).

18. This reliance provides crucial context for three important aspects of the parties' relationship.

19. First……

20. Second……

21. Third, and most importantly, SPMs act as Post Office's agents when transacting Post Office business, with all the ordinary obligations and liabilities that agency entails. Ultimately, Post Office cannot (and does not seek to) supervise or prescribe in detail everything that SPMs do in operating the agency business, but the basic fact is that SPMs are transacting Post Office business on its behalf. As with a more straightforward commission-based agency, SPMs are generally remunerated by reference to the number and value of Post Office transactions they carry out. The express and implied terms of the SPMC and the NTC need to be viewed through the prism of an expressly created agency relationship, and so the express contractual terms sit atop the body of law regulating the duties of agents to their principals. The common law principles of agency are important background to the contracts. And any implied terms need to be considered (and shown to be necessary) against that agency background."

(emphasis added)

112. It is therefore undoubtedly the case that "the factual background of how accounting works in a Post Office branch" and how the agency relationship operated, was squarely within consideration of the Common Issues trial, even on the Post Office's own case. I consider that the fair-minded and informed observer would know and take account of this.

Analysis of the grounds relied upon in the recusal application

113. I will now turn to the separate passages in the judgment relied upon by Lord Grabiner in the recusal application. I will take their categorisation, in terms of the headings under which I have grouped them, from Mr Parsons' evidence in support of the application. Lord Grabiner used different terms to describe them, and he did not use the phrase "critical invective". He also grouped some of them together in different categories. However, I consider that the most convenient way to deal with each passage is to use Mr Parsons' categories. By this exercise I will still be considering each passage, both in terms of its categorisation by Mr Parsons in his evidence in support, and also by Lord Grabiner.

114. Lord Grabiner did not refer to every single one of the passages identified in Mr Parsons' evidence for the application. I do not criticise him for this, as only one day was set aside for the hearing. I will however deal with all of the passages in Mr Parsons' evidence whether they were the subject of oral submissions or not. Lord Grabiner also dealt with some passages that are not in Mr Parsons' evidence. I shall deal with them separately at the end of this analysis; they are [954], [121] and parts of [569].

115. The grounds relied upon contained in the 15th witness statement of Mr Parsons identified passages of Judgment No.3 under each of three different categories of complaint. The passages identified were very numerous. I have reproduced the headings as they appeared. For section 1 it referred to "my fourteenth witness statement"; sections 2 and 3 referred to "Parsons 14". They both refer to the same document. They are as follows:

"Section 1: the specific findings of fact referred to in paragraph 24 of my fourteenth witness statement."
There were 61 separate paragraphs identified. They are:
20; 104; 105; 106; 115; 141; 142; 165; 172; 193; 208; 217; 218; 219; 222; 223; 246; 247; 248; 249; 263; 264; 274; 297; 302; 303; 309; 310; 311; 327; 328; 346; 352; 357; 402; 403; 437; 462; 479; 480; 492; 514; 515; 516; 517; 541; 543; 556; 557; 558; 569; 567; 723; 806; 819; 824; 852; 955; 1115; 1116; 1118.

"Section 2: the critical invective referred to in paragraph 25 of Parsons 14".
There were 34 of these. They are:
21; 28; 30; 34; 36; 117; 120; 123; 295; 368; 369; 370; 393; 394; 476; 483; 519; 520; 521; 522; 523; 532; 560; 561; 576; 577; 589; 595; 596; 723; 724; 1059; 1111; 1120.

"Section 3: Criticism of Post Office witnesses referred to in paragraph 25 of Parsons 14".
There were only 13 of these. They are:
375; 400; 408; 416; 418; 441; 425; 451; 458; 544; 545; 546; 547.

116. I shall deal with each different category or section in turn. Given this application is made in the middle of an on-going trial, there is not the great luxury of time available to provide an extensively detailed commentary upon each and every one of the 110 different paragraphs in Judgment No.3 that are subject to criticism. Nor do I consider, on an application of this nature and bearing in mind the authorities and the correct test, that such a detailed commentary is either required or desirable. However, each passage can be placed in context, and I consider that a fair-minded and informed

observer would consider that context. The recusal application takes the passages out of context. It is also necessary to identify the reasons why the decision on the recusal application has been reached. As a general comment before embarking upon the context however, I wish to make the following particular observations.

117. The Post Office attempted to strike out a very considerable amount of the claimants' evidence before the Common Issues trial. I heard that application on 10 October 2018 and produced a written judgment on it, Judgment (No.2) at [2018] EWHC 2698 (QB). That judgment was handed down on 17 October 2018. It contains detailed reasons why the application failed. Some of Mr Parsons' 15th witness statement goes back to the background to that application, and even earlier than it, and my comments in earlier case management hearings when I said the amount of evidence necessary to resolve the Common Issues trial would be narrow. I remain of the view that a great amount of the evidence of fact could and should have been agreed. However, it was not agreed. There were six Lead Claimants, and every one of them had contested issues of fact relevant to contract formation. My ruling on the strike out application meant that evidence (for example) concerning training was not inadmissible for the reasons explained in that judgment. Both parties led such evidence in any event in their witness statements. Had I struck out the claimants' evidence on training, the trial would only have heard evidence from the Post Office on training. There was no appeal from my decision on the strike out application or on Judgment No.2, which was handed down three weeks before the commencement of the Common Issues trial. Although I do not consider that what occurred prior to Judgment No.2, or even whether Judgment No.2 was correct or not (even though it was not appealed), is of the utmost relevance to the recusal application, even if it is, the fair-minded and informed observer would take account of everything that occurred in the proceedings, not mere extracts.

118. The listing of the multiple paragraphs in the 15th witness statement of Mr Parsons takes single passages from Judgment No.3 in the significant majority of cases, and relies upon them entirely out of context. One example will suffice. Paragraph 955 is said to be part of Category 1, "specific findings of fact", which are said by Mr Parsons to "give the clear impression that the Judge has already formed a firm view on these matters" as set out in paragraph 24 of his 14th statement. However, that paragraph when read as a whole actually states:

> "955. I have certain (non-binding) observations on the evidence that was given before me by both sides in the Common Issues trial in terms of training. A great effort was made by the Post Office to explain in detail how the training was structured and what its content included. Some evidence was given by the Lead Claimants of their experiences of the training, which the Post Office initially sought to strike out of their witness statements. That attempt failed, and once it was admitted as evidence, however, the court then at least had both sides of the story. This painted a very different picture to that presented by the Post Office witnesses."
> (emphasis added)

119. I do not understand how observations by a Managing Judge which are expressly said to be just that – observations – and which are also expressly said *not* to be binding, can be said to lead to an impression that I have a clear view on the training provided, and have made prejudgments on matters not yet tried.

120. Secondly, on the morning of 21 March itself, at 10.30am the Post Office handed up the 13th witness statement of Mr Parsons, which dealt with the factually incorrect statement made both to the court by the Post Office's Leading Counsel (on instruction from WBD), and to the claimants in a letter from WBD. This statement was necessary because the court had been told that Royal Mail plc had been asked by the Post Office for copies of the annual Ernst & Young ("E&Y") Audit Reports for the years 2000 to 2011, but Royal Mail plc was reluctant to produce them without a court order. The claimants had sought disclosure of these, because the 2011 E&Y Audit Report contained statements relating to Horizon and its fitness for purpose that the claimants considered supportive of their case.

121. It turned out that neither of these points were true. The Royal Mail had not been asked for these important documents; nor had the Royal Mail been reluctant to produce them without an order from the court. As soon as Leading Counsel for the Post Office discovered this, he corrected his statement immediately and wrote a letter to the court explaining the situation. This occurred on 15 March 2019, a non-sitting day. I had already made an order on 14 March 2019 for a hearing of a third-party disclosure application against the Royal Mail (based on what was said to be the "reluctance" of Royal Mail to produce these documents). This hearing turned out not to be necessary, because once asked for them, the Royal Mail was content to produce them. The reason that they had not been produced prior to that was very simple – the Post Office's solicitors had not asked the Royal Mail for them, even though they had told Freeths, and had also told the court (through their Leading Counsel) that they had.

122. This provision of directly inaccurate information to the court was something which Mr Parsons explained was a mistake, and I should record that as soon as Mr de Garr Robinson himself found out the true situation, he had immediately written to the court, explained that his instructions had been factually incorrect, and apologised. However, I had ordered a witness statement to be produced explaining the full situation, and it was this that was Mr Parsons' 13th witness statement, handed up at 10.30am. At 11.24 on the same morning that Mr Parsons provided his witness statement of explanation about this (so less than one hour after Mr Parsons' 13th statement) the recusal application supported by Mr Parson's 14th statement was served on the court by e mail. There was no mention of it in open court at all from anyone, until I raised it at 2.00pm that day, immediately after it had come to my notice. Nor was it mentioned at all in Mr Parsons' 13th witness statement.

123. I deal below in ***Waiver*** with the legal consequences, if any, of the Post Office waiting nearly two calendar weeks from receiving the draft Judgment No.3 on 8 March 2019 to issuing its recusal application on 21 March 2019. However, regardless of that period and its legal effect, I do not understand how the 13th witness statement of Mr Parsons could be dated and served on 21 March 2019 and not refer to the subject matter of a detailed statement, his 14th, dealing with such an unusual situation that was going to be served later the same morning. Even though the 13th witness statement was made about a very different subject, the imminent application could have been identified within it, or at the very least mentioned. Recusal applications, particularly made in the middle of lengthy trials, are not entirely routine. They ought not to be kept up one's sleeve. I consider that the pending recusal application should have been brought to the court's attention very much sooner than it was.

124. Thirdly, I have dealt above with the Post Office's position at the end of the Common Issues trial concerning findings as to credit of the Lead Claimants, and how it was somewhat contradictory. I explained this in Judgment No.3 in two paragraphs in particular:

"[57]. Finally, before turning to the individual witnesses, the Post Office adopted a curious position on the credit of some witnesses. There were issues of fact between some of the Lead Claimants and the Post Office on matters that went to the Common Issues. For example, for Mr Bates it was in issue whether he actually received a copy of the SPMC before he took over the branch. For Mr Abdulla, the sequence of buttons and commands which would be pressed by him as a SPM at the end of a Trading Period to generate a Branch Trading Statement was also the subject of contested facts. Although the Post Office made submissions as to these witnesses' credit – for example Mr Abdulla was said to have "lied frequently and brazenly" (in paragraph 592 of the Post Office's Closing Submissions) and some of his evidence was said to be "new and obviously untrue" (paragraph 593) the Post Office in Closing Submissions initially invited me not to make findings on credit.

[58]. That was plainly a confused position on the part of the Post Office. After a degree of exploration during oral closings, this confusion was not resolved. I therefore invited the Post Office to clarify their position on this after the hearing in writing. This was done, and the Post Office submitted that "the Court should refrain from making any findings of fact on matters going to issues outside the scope of the Common Issues trial, specifically matters going to issues of breach and causation."

125. The Post Office therefore expressly submitted to me that I should refrain from making findings of fact in the way explained. I expressly gave the Post Office the opportunity to consider, and clarify, its position on this, even after oral closing submissions had been delivered. They did so, served written clarification (which I referred to in [58] of Judgment No.3) and I adopted their wording, and added further wording of my own, to make clear the approach that I was taking to not making findings on matters yet to be tried. I stated in many places in Judgment No.3 that I was not making findings going to matters of breach, causation and loss, or to the Horizon Issues. This was the course the Post Office itself had asked me to adopt.

126. I made clear in the paragraphs in Judgment No.3 immediately following [57] and [58] which I have repeated above, that this was the approach that I was adopting in Judgment No.3. These paragraphs are not referred to at all in the 15th witness statement of Mr Parsons, and indeed he completely ignores them. The full context can be obtained by continuing on to consider [59] to [62] of Judgment No.3, which state:

"59. I accept that the correct approach is not to make any findings on issues of breach, causation, or loss upon what were called Horizon Issues, which effectively deal with the operation and accuracy of the Horizon system, and whether it is robust and/or whether it had the propensity to generate errors and shortfalls.

60. The Post Office is obviously concerned that findings of fact in this judgment may affect its prospects during any future trial on breach and causation. I will not be making any findings of fact in this judgment that go to contested facts that will be

dealt with as part of breach or causation. However, that is not the same as saying that the court cannot and should not deal with the credit of witnesses where this has been so directly challenged by the Post Office. A finding, say, in Mr Bates' favour on issues of fact such as whether he received a copy of the SPMC has to be made one way or the other, as that affects the formation of contractual terms in his case. That is not however (if that finding is in Mr Bates' favour) to say that thereafter and for all time in these proceedings everything that Mr Bates says in evidence will as a result be accepted uncritically by the court on future other issues. All a court can do is weigh up the evidence before it, observe it being tested against the other side's evidence and the documents that are put to a witness, and come to a conclusion.

61. The Post Office also invited me specifically "Not [to] take account of evidence which, while it may go to the witness's credibility, risks trespassing on a future trial or trials" (emphasis in original).

62. I do not consider that it is the right approach wholly to ignore evidence just because of such a risk. In my judgment the correct approach is to consider the evidence that was led by all the parties in the Common Issues trial, but not to make findings on matters that are more properly to be dealt with in later trials, such as the operation and efficacy of the Horizon system, breach, causation and loss. Some of the Common Issues are pure questions of construction. Some require an understanding of the Horizon and Post Office accounting process, such as Common Issue 13. Some, so far as they concern individual Lead Claimants such as Mr Bates, include issues of fact such as to whether he actually received a full copy of the SPMC. Where such issues of fact arise, I will deal with them. I will make no findings going to breach or causation, as they are not part of the Common Issues."

(emphasis added).

127. This approach – not to make any findings on breach, causation or loss, including the Horizon Issues – was repeated multiple times throughout the judgment.

128. At [35] I said: "I have made it clear that I will make no findings concerning breach, causation or loss in this judgment, as these are for later rounds of the litigation."

129. At [62] I said: "In my judgment the correct approach is to consider the evidence that was led by all the parties in the Common Issues trial, but not to make findings on matters that are more properly to be dealt with in later trials, such as the operation and efficacy of the Horizon system, breach, causation and loss."

130. At [168] I said: "Mrs Stubbs was then audited on 8 June 2010 for a closing audit by someone who said she was being suspended. As she put it, she was locked out of her own post office. I will not dwell upon the effect on Mrs Stubbs, which was profound. These will fall to be considered during the future trials on breach, causation and any loss. She sold her branch Post Office."

131. At [193] I said: "I do however make those comments without making findings on anything to do with breach, causation or loss."

132. At [270] I said: "I make it clear that I make no findings in relation to the issues to be dealt with in later trials, namely Horizon Issues, breach, causation and loss. It should therefore be clear that I make no findings on whether he [Mr Abdulla] falsified his accounts to the Post Office at the time, and if so, how, because that is not an issue before me in this trial."

133. At [328] I said: "Whether she [Mrs Stockdale] was right to act as she did at the time regarding her accounts is a matter for another trial. As with the other Lead Claimants, I am making no findings in respect of breach, causation or loss."

134. At [361] I said: "As with the other Lead Claimants, I make no findings concerning breach, causation or loss. Also, and again this applies to all six of the Lead Claimants, my acceptance of their evidence does not mean that all or any future evidence on all the other issues will automatically be accepted uncritically."

135. At [480] I said: "I make no findings on any matters connected with breach, causation or loss."

136. At [518] I said: "It must be understood with crystal clarity that I am not making findings on these substantive and serious issues in this judgment. Whether the Post Office was guilty of acting in the ways complained of by the Claimants can only be resolved later in these proceedings after other trials."

137. Finally, in the Conclusion and Summary section, I repeated the same point, again, and said at [1113]:
"This judgment does not contain any findings as to breach, causation or loss, and therefore it remains to be decided in future judgments whether the Post Office has behaved in the way in which Claimants allege…."

138. I consider those passages of Judgment No.3 to be extremely clear and wholly unambiguous. I also consider that the passages upon which the Post Office wishes to rely in the recusal application should be read subject to them, and also in their proper context. I do not consider that the description of them as a "mantra" by Lord Grabiner should diminish or dilute their status, or mean that they should be read in a way contrary to their clear words.

139. I now turn to the separate categories relied upon in the 15th witness statement of Mr Parsons.

<u>Section 1: findings of fact</u>

140. I will deal with these in groups.

<u>Passages that deal with the Lead Claimants' evidence of fact.</u>
[20] This is a factual summary of the claimants' case.

Mr Bates
[104] to [115] This is part of the summary of Mr Bates' evidence, which runs from [70]. However, the four passages relied upon by the Post Office entirely ignore [116] and [117] which states the following:

"[116] This shortfall occurred in the early days of Horizon, December 2000. Between that date and March 2002 therefore, it had been brought to the Post Office's attention by at least one SPM (Mr Bates) and potentially others (on the Claimants' case) that there were shortfalls and discrepancies being thrown up by Horizon that the SPMs in question could not properly investigate. The Post Office's response, eventually, at least so far as Mr Bates was concerned, was to write off the amount that could not be explained in this instance only, but to say that this was effectively a one-off solution and move on as though nothing was amiss.

[117] The full subsequent trial of Mr Bates' claim will show what, if any, consideration was given at the Post Office internally not only to this shortfall, but others (if there were others) in the period December 2000 to March 2002. If the Post Office did in reality do what Mr Bates suggests they did – namely bury their heads in the sand, press on regardless, and chase numerous SPMs for shortfalls and discrepancies caused by the Horizon system – then that would be behaviour of an extraordinary kind, and given the criminal implications for some SPMs, may be extraordinarily serious. On the other hand, Mr Bates' shortfall in December 2000 may, upon investigation by the Post Office, have been put down to early difficulties by SPMs in operating or understanding the new system and writing off the amount may have been decided upon as a pragmatic solution in the circumstances. I make no findings either way at this stage of the proceedings in this judgment."
(emphasis added)

Mrs Stubbs
[141] to [172] This is part of a summary of Mrs Stubbs' evidence, which begins at [126]. There were issues of fact relating to contract formation as she took over as SPM following the death of her husband. She gave evidence about what documents she was (or was not) given, and what she had (or had not) signed, and what happened on a visit to her branch by Mr Woolbridge (a Post Office employee who did not give evidence before me) the day after her husband died (he had been the SPM before her). Her credit was attacked by the Post Office and in order to resolve and make relevant findings as to her contractual relations with the Post Office, it was necessary to resolve these. I expressly state in the middle of [172] the following:
"I make it quite clear that I do not speculate on any of that. Nor is it possible to know what the outcome of the trial of the Horizon Issues will be later this year."

141. Given the issues of fact concerning Mrs Stubbs' contract formation, I do not consider any judge could properly make findings about whether she received the SPMC, knew of its contents, and/or ever signed certain documents, what took place at her meeting with Mr Woolbridge (who was not called), and its legal effect in her case, without making findings as to her reliability. I did this at the end of [172]:
"I accept her account of contract formation and the fact she never received, nor did she have any knowledge of, the SPMC."

Mr Sabir
142. The next group of paragraphs are [193] to [223]. These are part of the summary of Mr Sabir's evidence which begins at [174]. His evidence about training is accurately summarised, and he was robustly cross-examined about it.

143. To obtain the full meaning of [193] one has to consider the passage that states:

"…..Mr Sabir's evidence on this, which I accept, matches the other evidence from other Lead Claimants about in-branch training. Whatever the intentions of those who designed such training, which one supposes was to supplement and build on the classroom training, in practice for these Lead Claimants it was rather different. It is characterised by the trainers observing rather than training, and also by early departures from the branch itself by the trainers. I do however make those comments without making findings on anything to do with breach, causation or loss."

144. The Post Office, so far as the Lead Claimants who contracted on the SPMC contract form, explained its case in Opening Submissions that a SPM's liability for losses was contained in Section 12, paragraph 12 of the SPMC which states:
"The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants."

145. However, the first letters sent to the Lead Claimants by the Post Office. once shortfalls began to appear, did not refer to negligence, carelessness or error, or the terms of the SPMC. They contained text as set out in [221], namely as follows:
"[221]…… "A letter of 10 January 2010 told him that "you are contractually obliged to make good any losses incurred during your term of office for up to six years after your last day of service (Limitations Act 1980)". The period under the Limitation Act is correct. The claim that he had to make good "any losses incurred during your term of office" is simply wrong in fact and law, and does not even represent the Post Office's own case on liability in the Common Issues trial for losses in the SPMC. The letter before action of 1 March 2010 stated that "under the contract for services you are responsible for all losses occurring as a result of the acts or omissions of yourself or your assistants."
The quotations from the Post Office's own documents are accurate.

146. The comments in Judgment No.3 at [222] are in relation to the Post Office misstating in official correspondence (including in a letter before action) the scope of Mr Sabir's contractual liability for losses, even on the basis of the Post Office's own case. Each party's legal submissions on the scope of responsibility for losses were fully argued before me, and Mr Sabir's evidence included these letters. I consider it is open to any trial judge to make a comment of this nature without demonstrating there is a real possibility that future issues in future trials are being prejudged.

147. Mr Sabir's credit, findings of which are contained at [223], was roundly attacked by the Post Office in his evidence. This was done both in cross-examination and in closing submissions. At paragraph 589 of the written Closing Submissions, the Post Office submitted that "Mr Sabir's evidence……did not stand up. His apparently weak grasp of English in oral evidence (which was notable for its variability) should not be confused with a lack of intelligence. It was implausible that, as a commercial man making a significant investment (in conjunction with a partner) who was expecting a contract, he would not have asked for a copy……His evidence that he thought the *'standard'* term contract in fact contained his obligations to do certain things at the branch in his first 6 months as SPM was not credible".
(emphasis added)

148. In the light of that, Judgment No.3 would not only be potentially open to criticism, but deficient, had it *not* made findings as to Mr Sabir's credit. I consider such findings were required in order to resolve the issues of fact.

Mr Abdulla

149. The next group of paragraphs is [246] to [274] dealing with Mr Abdulla. Mr Abdulla was cross-examined on the basis that he had committed a criminal offence and he was given the necessary warning against self-incrimination under the Civil Evidence Act 1968. The summary of his evidence begins at [225] and runs to [273].

150. Mr Abdulla gave evidence about what his training included. I summarised this at [246] but made no findings as to the content of his training. The complaint about [247] ignores the sentence that states "Mr Abdulla's experience of the in-branch training was far from satisfactory, from his point of view." Mr Abdulla did give evidence that he was shocked at what he called "inadequate support" from the Helpline as set out in [248], said he could rarely get through and thought the operators were reading off a script. He gave evidence that he could not resolve the shortfalls he experienced through the Helpline, as set out at [249]. He was cross-examined by the Post Office on his suspension and termination, and on his experience of the Helpline.

151. No documents were produced and put to Mr Abdulla to demonstrate that further investigations had been made with Camelot leading to his summary termination, as identified at [264], even though the letter at [263] from the Post Office told him that investigations had been completed. However, no findings were being made in respect of breach, causation or loss, so this cannot be (and was not) elevated to a binding finding as to that issue in any event. No estoppel operates to prevent the Post Office from unearthing such documents or other evidence of any investigation(s), and putting them to Mr Abdulla at any future trial dealing with breach, causation and loss, or from leading any other evidence, or making any other submissions, when breach, causation and loss are dealt with in a future trial.

152. At [269] I explained the following:

"[269] The Post Office's case was put very squarely that he was lying, the submission being that he "lied frequently and brazenly" and that some of his evidence was "new and obviously untrue". He was challenged as having falsified his statement of truth of his witness statement in the same way as he had falsified the accounts he had submitted to the Post Office. I make no criticism of the way that Mr Cavender put this to Mr Abdulla, as it is an inherent part of the Post Office's case that Horizon is what is called "robust", that shortfalls experienced by Mr Abdulla were not caused by Horizon, and SPMs who had discrepancies in their branch accounts were either extraordinarily careless and/or they and/or their assistants were probably stealing or losing the money. The necessary points were put to Mr Abdulla entirely correctly and Mr Cavender was professionally bound to do this.

[270] However, I do not accept the challenge mounted by the Post Office to the content of Mr Abdulla's witness evidence before me. I do not find that he was lying, or that his evidence was untrue. However, his evidence must be viewed in the light of someone who acted as he did with the undated cheque and the potential misstatement of damaged bank notes. Horizon issues, and the TCs concerning the lottery, were not the only issues uncovered on the audit of his branch. He was, also, so convinced that

he had been treated badly by the Post Office, and his point of view became so extremely subjective, that he was not an entirely satisfactory witness. On matters concerned with his contracting with the Post Office, what he received by way of documents, how the Horizon system was operated and his experience of how it worked, I find his evidence reliable and I accept it. In fact, he was vindicated in terms of the Branch Trading Statement by the contents of Appendices 3 and 4. On factual matters concerning what occurred when the audit happened, how his suspension and termination occurred and were dealt with by the Post Office, I accept his evidence. So far as the actual substantive issues that were uncovered in the audit that led to his termination, namely the shortfalls, misstatement of mutilated notes and the undated cheque, express findings will have to wait until a later trial. There may be more to come so far as Mr Abdulla is concerned, as he had (potentially, as I make no findings on this) incorrectly entered the amount of damaged banknotes in the branch. His accounts were however prepared in the way he explained; that is, regardless of his view concerning any of the Transaction Corrections, he had no option but to "Accept Now" to reach the point of preparing or returning a Branch Trading Statement in order to open the next day. I make it clear that I make no findings in relation to the issues to be dealt with in later trials, namely Horizon Issues, breach, causation and loss. It should therefore be clear that I make no findings on whether he falsified his accounts to the Post Office at the time, and if so, how, because that is not an issue before me in this trial."
(emphasis added)

153. The final passage in this section that is criticised on the recusal application in respect of Mr Abdulla is that at [274]. It must be read, at the very least, together with [273]. That recounts that Mr Abdulla's evidence was that when he phoned the Helpline about shortfalls he was told he should pay them and wait for a Transaction Correction or TC to be issued in his favour. At [274] I accepted that was what he was told by the Helpline. Quite apart from the fact that other Lead Claimants gave similar evidence, if a witness says they were told something, a judge is entitled to believe, or disbelieve, them. The fact that Mr Abdulla was told that, does not resolve the Horizon Issues in the claimants' favour, nor does it lead to any findings on breach, causation or loss. Such findings were in any case expressly stated to be for another trial.

Mrs Stockdale

154. The next group of paragraphs is [297] to [328] dealing with Mrs Stockdale. The summary of her evidence started at [276]. She was a serving SPM when proceedings were issued against the Post Office in April 2016, in which she was included as a claimant.

155. The passages relied upon by the Post Office to justify recusal, namely [297], [302] and [303] accurately reflect the evidence she gave. I will not identify her evidence specifically in the transcript of Day 4, 13 November 2018, although they do appear there, but if I am wrong there is a conventional route for a dissatisfied litigant to challenge findings of fact.

156. Mrs Stockdale gave evidence that she could not identify what product had caused her loss, which is what is recounted in Judgment No.3 in [309] and [310]. She explained that Mr Longbottom could not do so either, and had referred the matter to the Horizon Technical Desk. Mr Longbottom was called by the Post Office and gave evidence, but

he could not remember very much about her branch and his evidence concerned the process of transfer audits generally. His evidence is summarised at [481] to [488]. Mrs Stockdale felt she had no option but to agree to pay back the shortfalls, and this is recounted in [310]. The statements in Judgment No.3 at [310] should also be read with [563] to [568]. However, [565] makes clear that the starting point of the analysis is:

"The Horizon system would show that there was a discrepancy at the branch, which so far as the SPM was concerned would have arisen through unexplained shortfalls and discrepancies."

It is also the case that the Post Office itself had relied, in paragraph 76(4), (5) and (6) of its Generic Defence under the heading "Factual Matrix", upon shortfalls and relative knowledge of how these might occur.

157. I had to deal with this point at [40] of Judgment No.2 on the earlier strike out application. I stated in that judgment:

"[40] To quote selectively from the above [ie the pleadings], the defendant's case is that a sub-postmaster who has settled an account "is bound by that account unless and to the extent that he discharges the burden of demonstrating that there are mistakes in the account". A different way of expressing what may be the same point is that "Sub-postmasters who allege that they are not liable for any losses disclosed in their branch accounts bear the burden of proving that such losses were not caused by "any negligence, any carelessness, or any error on their part". Given that the defendant expressly pleads as part of the factual matrix the matters at paragraph 76(4), (5) and (6) in particular, I do not see how it can be said that the evidence challenged in the witness statements going to each individual Lead Claimant's personal experience of having shortfalls identified, then their attempts to work out what had happened and how it had happened, can be said not to be relevant, or that it will never be sufficiently helpful to make it right to allow the Lead Claimants to adduce such evidence. The defendant's own pleading relies upon its interpretation or account of these events as part of the factual matrix, and does so expressly. Yet further, at paragraph 93(1)(a) of the Generic Defence, the defendant pleads that a certain inference or presumption arises "in the absence of evidence from a Subpostmaster to suggest that a shortfall arose from losses for which he or she was responsible". Given a considerable amount of the evidence challenged goes to establishing that there was such evidence, and hence the inference or presumption should not be applied to the resolution of the Common Issues, it is hard to see how such evidence can be said not to be of any relevance."

(emphasis added)

158. Further, the starting point for the passage relied upon by the Post Office as justifying recusal in [156] above is "the Horizon system". If the Post Office's case on the utility and robustness of the Horizon system is accepted, this means that the Post Office (and the court) would be able to rely upon the system as demonstrating, prima facie, that there was a shortfall. The phrase "so far as the SPM was concerned" makes it clear that the statement is one of the claimants' subjective point of view. Further, the analysis of what Mr Green called "the debt trap" makes it perfectly clear that no findings are being made in Judgment No.3 in respect of this situation:

"[567] The whole of this litigation is aimed at resolving the disputes involved between the different SPMs and the Post Office."

159. The circularity of the position in which Mrs Stockdale found herself, and the justness or otherwise of "the debt trap", will not be resolved until the end of the litigation generally, and findings of breach, causation and loss in Mrs Stockdale's claim.

160. Her decision, recounted in [311], to introduce a "robust paper recording system" was a summary of her evidence. On 16 September 2016 her appointment as an SPM was terminated, and that letter stated "….we have taken into account that you did not call the NBSC reporting the Losses" which is reproduced at [323] of Judgment No.3. The documents produced at the trial showed that she *had* contacted the NSBC (another term for the Helpline) and had also contacted the Post Office, as the Helpline call logs (which are Post Office documents) were disclosed and these evidenced her calls. The passage at [327] should be read in context generally, but with [323] in particular.

161. Finally, the passage complained of at [328] should be read in conjunction with the last half of the paragraph, which states:
"Whether she was right to act as she did at the time regarding her accounts is a matter for another trial. As with the other Lead Claimants, I am making no findings in respect of breach, causation or loss."

Mrs Dar

162. The next group of paragraphs concerning specific findings of fact is [346] to [357] which concern Mrs Dar.

163. The part to which objection is taken in [346] is "Mrs Dar considered the training inadequate." However, Mrs Dar's evidence was that she *did* find the training inadequate. Similarly, [352] and [357] recount the evidence she gave to the court. The way these paragraphs are relied upon by the Post Office in the recusal application do not take account of the evidence given at the Common Issues trial.

<u>Passages that deal with the Post Office's evidence of fact</u>

164. There are fewer of these by comparison with those dealing with the Lead Claimants' evidence of fact, but there are still a significant number.

165. Unlike the situation concerning the Lead Claimants' evidence, which the Post Office had expressly attempted to have struck out, the contents of the Post Office's witness statements were voluntarily adduced in evidence by the Post Office.

Mr Breeden

166. Both [402] and [403] concern the right of appeal under the SPMC form of contract. Mr Breeden gave written evidence (quoted in [402]) about what the Appeals Manager would do under the SPMC. He also gave written evidence that there was no such appeal process in the NTC; indeed, he specifically highlighted this as a difference between the two contract forms. Mr Green, when cross-examining Mrs Ridge, explored with her whether such an appeal under the SPMC was a review or a re-hearing. The relevant passages in the evidence of each witness about this – Mr Breeden's witness statement, and Mrs Ridge's cross-examination – were quoted in Judgment No.3 at [402]. The comments that followed at [403] highlighted the difference between two of the Post Office's own witnesses on this point. Their evidence was different about whether any appeal was a review or a rehearing.

167. If a party – here, the Post Office – calls two witnesses who give evidence on the same point (appeals under the SPMC), and that evidence is different between the two witnesses, then comment upon this difference is justified, in my judgment, by the trial judge hearing that evidence. Sometimes such comment might be unfavourable to the party calling the witnesses; sometimes it might be favourable; sometimes it might be neutral. Given the evidence had been called by the Post Office, I do not see how it can sensibly be later argued by that same party that the evidence it had itself voluntarily adduced was irrelevant, or should not have been considered by the judge who heard it. A party might regret calling certain witnesses, or certain evidence, after a judgment is produced, but that is a different matter. It was the Post Office that called these witnesses to give their evidence. Further, Mr Breeden's witness statement expressly said that the reputation of the Post Office would be something of which account would be taken by the Appeals Manager. I passed comment upon that evidence at [403], as I consider a trial judge is entitled to do.

Mrs Van Den Bogerd

168. The passage relied upon at [437] has to be read in conjunction with [434] to [436], which replicate Mrs Van Den Bogerd's evidence.

Mrs Dickinson

169. [462] also accurately summarises this witness' evidence (as well as that of Mrs Van Den Bogerd at [431]). These two passages must be read together. Further, the passage relied upon by the Post Office in terms of recusal, [462], is immediately followed by a statement making it clear that no findings are being made on wider or subsequent issues in unambiguous terms:
"Whether this is justified will only be resolved after further trials, and this judgment does not contain findings on breach, loss or causation."
This is a clear example of single sentences, or groups of sentences, within Judgment No.3 being extracted and relied upon out of context by the Post Office in the recusal application.

Mrs Ridge

170. The passage at [479] deals with Mr Abdulla's interview or meeting after he had been suspended. The transcript of that demonstrates that he raised the subject of a Lottery TC (or more than one TC) for £1,092. A Post Office document available in the trial, but not available to Mrs Ridge at that suspension interview which she conducted, showed that there were indeed a number of different entries relating to the Lottery, all for £1,092. The trial bundle reference of the document, an Excel spreadsheet, was {E4/92/1}, and its title is "96007 TC Data". Mrs Ridge accepted that the information in that Post Office document would have been useful to her, and that the number of different entries all for £1,092 "was a bit odd". The actual questions and answers from her cross examination on Day 10, 22 November 2018 are as follows:

"Q: Being fair to you, Mrs Ridge, trying to do your job, would that information [have been] pretty helpful to you?
A. It would have done.
Q. But you didn't have it, did you?
A. No.
Q. And nor did Mr Abdulla. So you weren't able to look at this and say, well, actually, this is a bit odd because they are accepting that an error has been made on

£1,092, and so it's a bit strange there are three previous ones.
A. It would have been a bit odd."

171. The statement at [480] that Mr Abdulla's hearing proceeded on incomplete information is entirely correct in fact, both on the documents not available at the time, the documents available at the trial, and also on Mrs Ridge's evidence. Even if it were not correct in fact, the remedy available (if a party does not agree with a factual finding) is not recusal of the judge who has made the statement.

Mr Webb

172. Mr Webb did Mr Sabir's transfer audit. The passage relied upon by the Post Office in this application is at [492] where the judgment states "it is clear that there was a recognition by at least some within the Post Office that 'day one training on site' was worthless." However, that is in relation to a Post Office document with the title "Field Team Feedback Appendix B" dated November 2011 which was put to Mr Webb in his cross-examination. At {F3/125/19} the following passage appears in the Post Office's document. A more full extract of the text in that internal Post Office document is:

"Completing the transfer and then expecting the branch to open in the afternoon is a very optimistic expectation. In all but a handful of cases the money transfer for the business does not take place until at least 2pm on the day of the transfer and it is quite often later than that. Once the money has transferred the incoming is then pulled in all directions. trying to learn from the outgoing what all the keys open and close, learning the locking up process, how the tills work. dealing with stock takers, removal men, agreeing meter readings, putting beds together so the children have somewhere to sleep that night. numerous phone calls from the bakery/ milk/ newspaper supplier wanting to set up accounts etc etc. The last thing they want to do serve in the PO. So you either get the staff running the branch, which is OK as you can get them coached in minimum sales standards (if required) but this could obviously be completed later in the week. However as the on-site FSA you want the new Sub-postmaster and it is very rare to see him/her. If a single person branch you get a very harassed person who wants/needs to be elsewhere and he/she takes nothing in. No matter how much you stress on the pre-transfer telephone call what the expectation is in my experience it does not happen successfully very often. I feel we should go back to lunchtime transfers and leave the PO closed pm. As branches are generally busier mornings that afternoons anyway less customers would inconvenienced. Branches where there are staff or the Sub wants to could still open after the transfer once the money has gone through and it would make better use of FSA time as we would not need to attend until lunchtime in all but the busiest branches where it may be beneficial to go a bit earlier. We would not to sit around for at least half a day and sometimes considerably more awaiting the transfer of funds. I am of course aware that there would be an additional cost of one day on site training if it was decided to stick to the same delivery package as at present. <u>but this would in my opinion be justified as the value of day one on site in terms of training is generally worthless.</u>"

(emphasis added)

173. The word "worthless" for "day one" training is expressly used in the actual internal Post Office document put to Mr Webb. Actually, the exact phrase is "generally

worthless". Judgment No.3 simply reproduced the word "worthless" from one of the Post Office's own internal documents. I do not consider there is an appreciable difference between the two expressions, "generally worthless" on the one hand, and "worthless" on the other. I also do not understand how reproducing the same word used in the Post Office's own internal document can be relied upon by the Post Office in this recusal application. This is an example of the pitfall of considering a single passage of Judgment No.3, deciding it is critical of the Post Office, and using it to justify a recusal application, without taking into account either its context, or the evidence that unfolded in the Common Issues trial. The fair-minded and informed observer would be assumed to be precisely that – informed.

Mr Carpenter

174. [514] to [517] of Judgment No.3 concern Mr Carpenter's evidence. He had performed an audit on Mrs Stockdale's branch, after the litigation was commenced and Mrs Stockdale was a claimant. These four paragraphs track the evidence on this point.

175. The Post Office, through its solicitors WBD, had refused to disclose any documents that went to the decision to audit Mrs Stockdale's branch after the litigation had commenced. Given any company or natural person in this jurisdiction is permitted to bring their disputes to court for resolution (with the exception of parties to binding arbitration agreements governed by the Arbitration Act 1996) I found that approach worthy of some scrutiny, for the reasons explained in the judgment. Further, WBD had, in refusing to disclose the documents, stated that the relevance of such documents was not accepted. Given the issues in the litigation, and given Mrs Stockdale was expressly accused of a criminal offence on the basis of the result of the audit itself, I expressed certain views in Judgment No.3, which I need not repeat here.

176. I consider guidance is to be expected from the Managing Judge on matters such as contested disclosure, providing that guidance does not indicate that there is a settled point of view on the substantive issues, or indeed on future interlocutory applications. I do not consider that the fair-minded and informed observer would conclude that any future matters would be prejudged on the basis of these passages.

Miscellaneous points

177. There are then an assorted number of paragraphs relied upon by the Post Office that are not linked by any particular topic, but are assorted passages from throughout Judgment No.3, including comments upon the evidence. They are the following:
541; 543; 556; 557; 558; 569; 567; 723; 806; 819; 824; 852; 955.

178. None of them contain any findings on the Horizon Issues, breach, causation or loss. One of them, [569], contains my findings of fact to set out the Factual Matrix within which the contract terms have to be construed. I may have been wrong in reaching certain factual conclusions, which might be said on any application to appeal Judgment No.3 not to have been open to me, but I do not consider that to be a ground of recusal. Further and in any event, the so-called Category 2 facts contended for by the claimants were identified to the Post Office in terms considerably before the Common Issues trial even commenced. No submissions were made by the Post Office that if I found any of the contended for facts in the schedule to be made out, this would run the risk of apparent bias. These facts were contained in a detailed and lengthy schedule because the claimants had been seeking to have a great many facts

agreed. They were contended for by the Lead Claimants and I do not consider that making findings of fact sought by one party to litigation disqualifies me from further involvement in the case on the grounds of apparent bias.

179. I have set out above how [955] is preceded by a statement that the judgment was making "certain (non-binding) observations on the evidence that was given before me by both sides in the Common Issues trial in terms of training." [955] in any event was part of reaching the conclusion at [957], which was that SPMs could not be expected to train their assistants to a higher level than that to which they themselves had been trained. This was part of the answer to one of the Common Issues itself, namely Common Issue 23.

Conclusion passages

180. There are three of these, and they are in the final section of Judgment No.3, namely "Conclusions and Summary". They are those numbered [1115], [1116] and [1118]. They are preceded by [1112] – which needs to be fully considered on this application -- that states:
"This judgment does not contain any findings as to breach, causation or loss, and therefore it remains to be decided in future judgments whether the Post Office has behaved in the way in which Claimants allege….."

181. The part of [1115] relied upon by the Post Office is the part that states "Internal documents obtained in this litigation show that some personnel within the Post Office believed at the time that at least some of these [ie discrepancies and losses] were caused by Horizon." It is difficult to see how that passage can justify this application, however, given that is exactly what some of the internal documents do say. One example of this will suffice.

182. On 1 November 2000 an internal e mail from Frank Manning to Sue Locke (both of the Post Office) timed at 14:39 stated: "We talked about this case when I was in St. Albans last month & it is still on-going. I visited there today & was too scared to accept a cup of tea in case the Horizon system crashed cos the electricity supply is still a live (excuse the pun) issue. The balances are a mess (in pre Horizon times - the Postmistress virtually achieved a clean balance every week) & I've got the RNM going in there next Wednesday to see what actually happens on the ground but I worry that something like 25 re-boots in one day is having an effect overall. Need your best offices to get this case to a proper solution - she keeps getting promises of attention - but nothing is actually being done now to clear up the problem. **It is Horizon related** - the problems have only arisen since install & the postmistress is now barking & rightly so in my view. Help please."
(the bold emphasis **"It is Horizon related"** is present in the original)
In the answer sent from Sue Locke back to Frank Manning on 2 November 2000 at 09:24 she asked:
"Frank - As discussed when you visited, can you confirm that the office have had an independent electrician visit it and that the problems are due to the electrics input by Horizon?"
The answer to this was from Mr Manning in an e mail of 12:58 on the same day and he stated:
"Answer is YES to both points."

183. These are internal documents from the Post Office. Ms Locke and Mr Manning are properly described as Post Office employees. [1115] is an accurate summary, and also makes it clear that it is a matter of the subjective belief of the author of the e mails, and not a finding that the problems were Horizon related. That will depend upon the outcome of the Horizon Issues trial. These specific e mails were deployed in oral opening by the Lead Claimants, cross-examined upon, and I consider the conclusion I expressed (which said that "some personnel" at the Post Office believed that "some" of the losses were Horizon related) is a conclusion open to me on the evidence. It made no binding findings in relation to any matters to be dealt with at later trials. I do not consider that the fair-minded and informed observer would conclude there was a real possibility of bias as a result.

184. Another way of testing this is to consider the following position. Could the claimants, at any subsequent trial(s), rely upon that passage of Judgment No3 as demonstrating that the court had already made a binding prior finding to the effect that it was Horizon that had caused the discrepancies and losses? I do not consider that they could. Equally, would the fair-minded and informed observer concentrate upon that passage and determine that any of the remaining issues in the litigation would not be fairly judged in subsequent trials? Again, I do not consider that they would, or could, on the actual wording of the passages themselves.

185. The passage within [1116] correctly summarises the evidence of Mrs Van Den Bogerd which is set out at [431].

186. Finally, the summary of the so-called "ping fix" contained in [1118] is a summary of Mrs Van Den Bogerd's evidence which is set out in more detail at [426], [427] and [428]. The document from which the figures were taken in [1118] is, again, an internal document created by the Post Office, is entitled "TC Volume Summary" and its trial bundle reference was {G/54/1}.

187. Accordingly therefore, I consider that the passages relied upon in this section of Mr Parson's 15th statement, when read in context of Judgment No.3 as a whole, and in particular the evidence adduced at the trial by both parties, together with the internal Post Office documents, do not justify the statement in his 14th or 15th witness statements that a fair-minded and informed observer would conclude that there was a real possibility that a formed view had been made, that binding findings had been made on breach, causation, loss or the Horizon Issues themselves, and/or that any remaining issues had been prejudged. The words of Judgment No.3 state directly to the contrary.

Section 2: so-called "critical invective"

188. There are not so many of these as in Section 1, but there were a considerable number identified by the Post Office nonetheless. 12 of these were not amplified by Lord Grabiner in his oral submissions, and he did not use the phrase "critical invective". Regardless of that, I will deal with each passage identified by Mr Parsons.

189. I will deal with them in groups. The word "attack" was used extensively in the Post Office's written skeleton for the recusal application, to describe findings in Judgment No.3 that were made in respect of its witnesses. That skeleton also (in paragraph 47) states that Judgment No.3 involves speculation "as to terrible things that [the] Post

Office might have done". A list of what are said to be speculations then follows, including the motivation at the Post Office for the change in terms of the NTC, and destruction or failure to preserve evidence, and failure to produce documents that are adverse to it.

190. However, these submissions by the Post Office ignore some salient features. The first is that Judgment No.3 does not state or find that all of these things have happened, and in many cases expressly states that no findings are being made. I do not consider that demonstrates a closed mind, or that an act of prejudgment has occurred. Further, some of the matters identified in paragraph 47 of the Post Office's skeleton argument for the recusal application have in fact been done. The term "terrible" is a word used by the Post Office in paragraph 47; it is the Post Office's choice of word. Opposed disclosure applications have been necessary in respect of the Post Office. Some physical evidence is no longer available, and has been discarded. This is not in dispute. Whether the word "destroyed" is correct, physical evidence no longer exists that once did. Mr de Garr Robinson QC for the Post Office explained the following when making his oral opening submissions for the Horizon Issues trial. There is no Legacy Horizon equipment still available for consideration by the experts, or for use in the litigation, as it has been discarded, and the Post Office is aware of this:

"The system -- there is no Legacy Horizon system still in operation that people can go and check, that people are still operating. People are working off their recollections and off design documents that are now very elderly and that problem has been compounded by the fact that when Mr Roll made his witness statement in 2016 -- it was provided in September last year -- the things that he said in that witness statement were quite hard to follow and we will see how hard they were to follow when he gives evidence later on this week."

(emphasis added)

191. Whether the failure to retain an operating system amounts to "destruction" or not, and the effect of that (if any) regardless of which precise term is used, has not yet been decided, and indeed may never need to be decided. Mr Godeseth was cross-examined about this during the Horizon Issues trial on Day 8 in the context of requests from an expert witness some years ago who was acting for a defendant SPM in a particular set of criminal proceedings. The Horizon Issues trial is ongoing, the expert evidence has not been heard, and no closing submissions have been received. There is no dispute on this concerning Legacy Horizon; it is no longer available.

192. There is a far more detailed analysis within Judgment No.3 of the position regarding disclosure and documents than making assertions in a blanket fashion of "terrible" things. Judgment No.3 makes a finding that accepts Mrs Stubbs' evidence that she had been told by the SPM who took over her branch that an instruction was given to destroy her records. All this relates to is what Mrs Stubbs was told; there is no finding that the records were in fact destroyed. Her records may yet be produced, nor has any evidence yet been given by any Post Office witnesses about what happened to the records in her branch after she was suspended. All these matters will be explored in later trials.

193. I do not accept that making findings on a witness' reliability, or rejecting their evidence, amounts to "an attack". It is a judgment or a finding on the evidence, or upon the witness. The fair-minded and informed observer would be aware that if the evidence of a particular witness is not reliable or is rejected, the trial judge is entitled (if not required) to say why.

The Post Office's position on credit and Introduction

194. The passages numbered [21] to [36] come from the Introduction in Judgment No.3. [21] is an accurate summary of the Post Office's position on credit. Mr Cavender QC made written submissions in the Common Issues trial that attacked the credit of the Lead Claimants. I have dealt with Mr Sabir at [147] above. The written closing submissions of the Post Office in respect of Mr Abdulla stated (at paragraph 592):
"The central fact about Mr Abdulla's evidence cannot be avoided: he lied frequently and brazenly". That submission has been identified already in this judgment when detailing the attack on the credit by the Post Office of the Lead Claimants.
Initially in cross-examination the following question was put to Mr Abdulla, before he had been given the warning against self-incrimination.
"Q: "This is misuse of Post Office funds and false accounting". So that was what was being alleged against you."
Before Mr Abdulla could answer, I stopped the proceedings so that the warning could be read to him; indeed, it was practically 1.00pm on that day (Day 4, 13 November 2018) in any event, so I also explained to Mr Abdulla that he should re-read that part of his witness statement. It was expressly put to him in cross-examination that he had falsified his accounts, which is a criminal offence. This was a lengthy piece of cross-examination – and that statement should not be taken as being in the least critical of Mr Cavender, as Mr Abdulla would not always let him finish, and questions sometimes had to be put more than once – but ended with the following summary:
"Q: You knew your declarations were untrue.
A. No.
Q. And you knew you were misleading Post Office?
A. No, I don't agree.
Q. And you did so deliberately?
A. No."

195. Mrs Stockdale was similarly challenged, albeit on different facts. She too was given the warning under the Civil Evidence Act 1968.
"Q: So you were deliberately mis-declaring items of stock or cash?
A. I wasn't doing it deliberately, no.
Q. To cover that up, no?
A. I wasn't doing it deliberately, no."

196. This passage was followed later with:
"Q: So unpacking that, do I take it that you had been mis-stating your accounts in order to hide those discrepancies? Because you say you had settled them when in fact you had not.
A. I don't want to answer that question.
Q. So would it be right that when, during that period, you certified under the following words:
"I certify the content of this balancing and trading statement is an accurate reflection

of the cash and stock at this branch."
That when you signed that in fact it was untrue?
A. I never signed it.
Q. Who did sign it?
A. No one."

197. However, notwithstanding the issues of fact concerning contract formation with these witnesses, and the above passages, in oral closing submissions Mr Cavender invited me not to make findings on their credibility. This seemed to me to be rather a confused position. I therefore gave the Post Office the opportunity to consider the matter carefully and give me further written submissions on how they sought to have me approach this subject. This they did, and I have identified above what the Post Office's post-hearing submission was in this respect. I do not consider that describing this as a one-way approach, or confused, qualifies as "critical invective". Given the way that these witnesses were cross-examined and the nature of the written closing submissions, giving the Post Office the chance further to reflect and clarify its position in writing after the trial could potentially be seen as generous.

198. Stating that there are a number of potential reasons why a party might make submissions of the type identified in [28] is neither critical, nor is it invective. That passage identified that there might be a number of reasons why a litigant sought to caution the court against "personal sympathy", even though it ought to be well known that judges do not rely upon, nor are they influenced by, personal sympathy in any event.

199. So far as [34] is concerned, the Post Office sought to strike out in excess of 160 paragraphs of the claimants' evidence in total, which led to Judgment No.2. These paragraphs concerned (for example) training and the operation of the Helpline, even though these very subjects formed part of its own evidence in chief in numerous witness statements. Relevant passages in the evidence of the Post Office's own witnesses were identified in the counter schedule to Mr Hartley's 4th witness statement on that application.

200. In any event, I have already made certain observations of the Post Office's approach to relevance of evidence in Judgment No.2, in arguably critical terms, which has not been referred to at all by the Post Office on this recusal application. These criticisms came over six months ago. At [14] of Judgment No.2 I said:
"[14] The background situation that has led to this application suggests, sadly, that this counter-productive approach lurks in the background to this application. The defendant first made complaint – or raised concerns – about the scope of the claimants' evidence about one year ago in October 2017. Given the statements themselves were only served in August 2018, that shows considerable, if not almost supernatural, foresight on the part of the defendant. There have been various proxy wars about the claimants' witness statements in the period from October 2017 onwards, even though no such statements were in existence. Indeed, notwithstanding the high number of interlocutory appearances before me, it was a rare hearing when the subject was *not* mentioned. Given there were no witness statements available to be considered on the majority of these occasions (and indeed not at all prior to the short notice hearing on 11 September 2018), this was a highly unusual situation."

201. At [26] of Judgment No.2 I said:
"[26] The application by the defendant to strike out this evidence appears to be an attempt to hollow out the Lead Claimants' case to the very barest of bones (to mix metaphors), if not beyond, and to keep evidence with which the defendant does not agree from being aired at all."
(emphasis added)

202. At [32] of Judgment No.2 I said:
"[32] When one considers the purpose of this Group Litigation, attempting to strike out such evidence now on the grounds of lack of relevance at this stage of the proceedings to the Common Issues seems to me to be rather puzzling. Mr Green QC relied very heavily that this was Group Litigation and what may not be of primary and direct relevance to one Lead Claimant could very well be of considerable relevance to a large number of the others. I accept that submission. He also submitted in his written skeleton that the application "appears to be an attempt by Post Office to secure an advantage at the Common Issues Trial by selectively tailoring the evidence which the Court is to consider." I accept that submission too; the application certainly gives that appearance."

203. There is nothing in Judgment No.3 that deals with the Post Office's approach to relevance that has not been stated already in publicly available judgments, and which has passed entirely without demur. The criticism in Judgment No.2 would not lead to the fair-minded and informed observer concluding I had pre-judged the Common Issues, or any other issues yet to be tried at that stage. I do not consider that any criticism in Judgment No.3 would do the same for the rest of the litigation.

204. So far as [36] of Judgment No.3 is concerned, this should be read in conjunction with Part F of the Judgment which runs from [574] to [598], the passages concerning the refusal by the Post Office to disclose documents relating to the audit performed upon Mrs Stockdale at [520] to [525], my analysis of Mrs Van Den Bogerd's evidence at [409] to [441], and my summary at [545].

Mr Bates

205. The passage in [117] identified by the Post Office and relied upon in its recusal application ignores the word "If", and also the final sentence, "I make no findings either way at this stage of the proceedings in this judgment".

206. So far as [120] is concerned, complaint is made regarding my comments about redactions. However, the names *were* redacted. There have been more redactions than one would usually expect in these proceedings, and this is a live issue even during the Horizon Issues trial. However, that is not going to be determinative of the substantive issues in the case. Mr de Garr Robinson QC was, when the Horizon Issues trial was stopped due to this application, in the middle of a review of redactions that I had asked him to perform. This was in addition to another redaction review already at that time being performed. At the end of Day 5, during the cross-examination of Mrs Van Den Bogerd in the Horizon Issues trial, various documents that had been partially redacted were put to her by Mr Green. I asked Mr de Garr Robinson QC for the Post Office to conduct a review of redactions of nine of these documents. Of the three that Mr de Garr Robinson had been able to review by the next morning (the exercise was still underway when the recusal application was received) one of the three had its

redactions removed and these were then put to Mrs Van Den Bogerd the next morning.

207. I consider that it is part of the function of a Managing Judge in Group Litigation – indeed, any judge in any litigation – to provide guidance and encouragement to all litigants to observe the correct procedural approach. Doing so does not count as critical invective. It is not necessary to consider this subject here in any great detail, but redactions are only properly justified on the basis of privilege. This statement should not be taken as pre-judging any contested applications that might be made in the future, on this (or indeed on any) subject.

208. The passages complained of at [123] are not critical invective, and I do not consider that a fair-minded and informed observer would conclude that they are, or that there was a real possibility of bias as a result.

Mrs Stockdale

209. The passage relied upon by the Post Office is [295]. This relates to the time when replacement of IT equipment may have taken place. As a result of that replacement, a recording of an important interview is not available. There were issues of fact about what was said at that interview. Litigants have a duty to preserve records, which includes recordings of interviews. The observations are not critical invective. Mrs Stockdale was suspended after the litigation commenced.

Mr Beal

210. The passages relied upon by the Post Office are [368] to [370]. The position of the NFSP was relevant for two reasons. These are identified in Section F at [575] at the beginning of that entire section dealing with the relationship between the Post Office and the NFSP. This runs to the beginning of Section G at [600]. The Post Office sought to rely upon the involvement of the NFSP both to bolster its case, and also as it was relevant to what the Post Office termed the interpretive spectrum of contracts. The NFSP is specifically referred to in the NTC itself. This contract expressly states:
"The National Federation of Subpostmasters (the NFSP) is an independent members' organisation supporting operators of Post Office branches across the UK and is solely acknowledged by Post Office Limited as a represented body of operators."
Making findings of lack of independence is not critical invective. I have explained the context of the NFSP to the Post Office's case generally both on negotiation of terms, and implied terms, above.

Mrs Rimmer

211. The two passages relied upon are [393] and [394]. I commented at [394] upon the content of her witness statement that was not evidence at all, merely arguing the case.

212. In 2017 the Commercial Court established the Witness Statement Working Group, which was subsequently expanded to cover the Business and Property Courts. In 2018 it carried out an extensive survey on witness statements in general in civil litigation. All Specialist Bar Associations, Specialist Solicitors Associations and the London Litigation Solicitors' Association were invited to take part, as well as all the judges. It was widely advertised and is widely known about across the High Court, not just the Business and Property Courts. Over 900 responses were received. This Group Litigation is in the Queen's Bench Division, not the Business and Property Courts, but

it would be surprising if at least some of those acting for each of the parties are not either members of specialist associations, practice in the Business and Property Courts for at least some of the time, or were otherwise unaware of the survey.

213. One specific question posed in the survey was "to what extent are each of the following a reason witness statements do not currently fulfil their purpose?", followed by reasons for someone answering the survey to identify. The reasons included "they stray into legal argument"; "they fail to reflect the witnesses' own evidence"; and "the existing rules are not followed". As long ago as the 1996 Final Woolf Report on Civil Litigation Reform (which led to the CPR) paragraph 59(d) on page 130 recommended that a witness statement be in a witness' own words. The CPR makes clear at CPR 32.4.5 that a witness statement should be in a witness' own words. CPR Part 32.4 requires that a witness statement should contain evidence that the person would be allowed to give orally. These are matters of public knowledge and I consider that a fair-minded and informed observer would know of them.

214. The passages in Mrs Rimmer's evidence that are quoted in [393] would not be permissible orally. Her statement about what would be "a reasonable expectation" is inadmissible for at least two reasons. Firstly, it is argument. Secondly, in so far as it is not argument, it is her opinion.

215. I do not consider that the fair-minded and informed observer would conclude that the comments made in [394] are critical invective. No findings were made and I specifically identified two things. Firstly, the point was not put to the witness about whether she wrote her statement herself, and I did not criticise her for it. Secondly, it should not have been in her statement. Neither of those statements are objectionable and I consider they reflect the approach required by the CPR for witness statements. If no comment were permitted by judges when witness statements contained irrelevant comment or argument, or otherwise did not comply with the rules, then litigants would come never to observe the rules. There are many trials still to come in this group litigation, and guidance on observing the rules for witness statements will, if followed, save time and cost in the litigation generally.

Mrs Ridge

216. Two passages are relied upon by the Post Office and they both appear in [476]. The first relates to the impression her witness statement sought to give, which is that she relied upon certain documents when upon cross-examination it was clear she did not. Her witness statement concentrated upon documents from Mr Trotter's interview with Mrs Dar in 2013, which took place 7 years later. It was expressly stated that findings were made in respect of the second passage, and it did appear as though that part of her statement had been written by her. Certainly, the evidence contained in it was somewhat different from her evidence as it emerged in cross-examination.

217. This paragraph does not contain critical invective.

Mr Longbottom

218. The passage complained of deals with the fact that Mr Longbottom, a Post Office auditor, who was called as a witness by the Post Office, had a document put to him concerning an attempt he had made to discover the reason for shortfalls/discrepancies. This showed that he asked within the Post Office for certain internal documents to be

provided to him, so that he could try and get to the bottom of these shortfalls. The Post Office declined and/or failed and/or refused to provide him with the documents he had requested. I could not, when drafting Judgment No.3, nor can I now, think of a reason why the Post Office would refuse to give its own auditor documents he had specifically requested, and which he considered he needed. Internal suppression of material is one potential explanation – certainly no explanation at all has been proffered by the Post Office – but I made it clear that I was making no findings.

Mrs Stockdale and disclosure

219. This concerns paragraphs [519] to [523]. This subject is adequately explained in the passage in Judgment No.3 that runs from [514] onwards, and also [318] to [327].

220. My concerns were based upon all the evidence before me, which included evidence from the Post Office's own witness who performed the audit itself. I do not consider that expressing those concerns amounts to critical invective. The Post Office had it in its own power to dispel any concerns quite readily, well before the trial, by disclosing the documents that Freeths had sought in the summer of 2016. It chose not to do so. I do not consider that such observations upon that are "critical invective" or something unfair, and particularly so in the absence of the documents and/or an explanation. In any case, the reason why the Post Office decided to audit Mrs Stockdale is not going to be dispositive of any of the Horizon Issues, or indeed on her claim, unless a great many other issues are resolved in her (and the claimants') favour in any event.

Mr Trotter

221. The same comments concerning Mr Trotter and [532] apply as made above at [212] to [215] of this judgment. It is not critical invective to identify differences between the evidence in chief of a witness, contained in their written witness statement, and how that evidence emerges after it has been tested and explored in cross-examination.

The Post Office's approach to documents

222. I do not consider that the criticism of the Post Office's approach to documents at [560] to [561] in Judgment No.3 can properly be described as critical invective. A large number of interlocutory hearings have been necessary in this litigation, and a significant amount of time has been required to deal with contested disclosure from the Post Office. There are other examples that could be given but it is unnecessary to do so.

223. The amount of unnecessary time and legal cost spent on contested disclosure could (and in my judgment should) be dramatically reduced. This litigation has a very long way to run before it reaches its final conclusion, whatever that may turn out to be, but it will reach that point more closely aligned with the overriding objective if a proper approach is taken to disclosure. I consider that the role of Managing Judge includes attempting to keep the parties to a close observance of the CPR in order to comply with the overriding objective.

The National Federation of Sub-Postmasters ("NFSP")

224. The passages between [576] and [596] relate to the relationship between the Post Office and the NFSP, which Part F of Judgment No.3 considers in some detail. The passage relied upon at [577] by the Post Office in this application is comment upon a contemporaneous document passing between the Post Office and the NFSP. It is part

of what was taken into account in reaching the conclusion that the NFSP is not properly independent of the Post Office. It is not critical invective.

225. The changing of the text on the NFSP website during the trial, in terms that potentially assisted the Post Office's case, was something that the claimants identified during the trial. [589] to [596] analyses this in detail and correctly summarises the events. The findings at [596] might not be correct in fact (in the sense that it is open to the Post Office to seek to appeal them) but these are not critical invective. The Post Office could, had it wished, have sought to provide an explanation, or even call someone from the NFSP to deal with this (although permission to do so would have been required). It sought to do none of those things during the Common Issues trial.

Relational Contracts

226. The passages relied upon by the Post Office at [723] and [724] are part of a rather longer section of Judgment No.3 that deals with whether the contracts between the Post Office and SPMs are what are called relational contracts. This is Part J, Relational Contracts which runs from [702] to [768].

227. The two passages relied upon by the Post Office in this application should be read in context. The passage immediately preceding is at [722] which states:
"[722] It follows that I therefore do not consider that what the Claimants refer to as "the imbalance of power" has any effect upon whether the contracts are relational ones. This appears to me to be equivalent to saying "the contract terms are unfair; please re-balance them by finding they are relational contracts". That is the wrong approach. The Claimants, in different ways and in respect of different Common Issues, drew regular attention to what was identified as a dramatic imbalance of power between the parties. These features are that the Post Office decides the terms upon which SPMs contract, having had those terms drafted for themselves by their legal advisers (subject only to the nominal involvement of the NFSP). They impose their draconian effect upon SPMs, and behave with impunity and oppressively, as demonstrated (it is said) by their behaviour towards the Lead Claimants."
(emphasis added)

228. This is followed by [724] which expressly states that the complaints of imbalance of power are not relevant:
"[724] There is no doubt that the Post Office is in an extraordinarily powerful position compared to each and every one of its SPMs. It appears to wield that power with a degree of impunity. However, I do not consider any of the complaints of imbalance of power are relevant to the determination of the correct categorisation of the contractual relationship, and whether the contracts are relational ones. Onerous and unusual terms, incorporation thereof and considerations of the applicability of the Unfair Contract Terms Act 1977 are dealt with separately, but I repeat that it is the circumstances of the relationship, defined by the terms of the agreement, set in its commercial context, that is what decides whether a contract is relational or not. This plainly must be considered at the time of contracting."
(emphasis added)

229. Taking isolated sentences out of context is not, in my judgment, the correct approach on any application such as this seeking recusal. I do not consider that the passages relied upon are critical invective, whether taken out of context or not. I also made it

clear that the claimants' complaints of "imbalance of power" were not relevant, in my judgment, to whether the contracts are relational. Sometimes first instance judges decide a point against a party, but there is always the possibility that such a finding might be overturned at appellate level. Here, Judgment No.3 dismissed the imbalance of power argument relied upon by the claimants, but could not sensibly avoid making observations on the factual arguments that underpinned it. Otherwise, if (for example) the Court of Appeal were to decide I was wrong on imbalance of power, and that the points were relevant (contrary to my finding) there would be no factual expression in Judgment No.3 that could be applied or considered by the Court of Appeal, if their Lord and Lady Justices were so minded. This is entirely conventional in a first-instance judgment.

Extent of liability under the NTC

230. The Post Office changed the contract terms under which SPMs contract with it under something called the Network Transformation Programme. The new contract, known as the NTC, has a very different clause dealing with a SPM's liability for losses compared to its predecessor, the SPMC. The SPMC had expressly included and referred to fault by a SPM:
"The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants…."
The equivalent term in the replacement NTC contract did not, and used far wider words:
"The Operator shall be fully liable for any loss of or damage to, any Post Office Cash and Stock (however this occurs and whether it occurs as a result of any negligence by the Operator, its Personnel or otherwise, or as a result of any breach of the Agreement by the Operator) except for losses arising from the criminal act of a third party (other than Personnel) which the Operator could not have prevented or mitigated by following [the Post Office's] security procedures or by taking reasonable care."

231. This change from the SPMC to the NTC occurred in 2011. Horizon was introduced in 2000, and the claimants' case is that the problems with the Horizon system in terms of discrepancies and shortfalls commenced shortly after that. Mr Beal, a senior witness for the Post Office, told me the Post Office's intention in drafting the NTC was to replicate the fault-based liability of a SPM contained in the SPMC. I rejected that evidence. The passage at [1059] is not critical invective.

Conclusions

232. The passages at [1111] and [1112] are relied upon by the Post Office in this application. These are expressly stated as being the claimants' subjective point of view. This is entirely clear from the words "So far as these Claimants…..are concerned" and "the SPMs who are Claimants do not trust it very far". Given the range of causes of action being advanced by the claimants against the Post Office, including deceit, malicious prosecution, duress, harassment and concealment of material facts, a summary that states that the claimants do not trust the Post Office is an accurate and succinct statement of the claimants' case.

233. The passage at [1120] is a summary of the finding of lack on independence on the part of the NFSP, explained in detail in Part F of Judgment No.3 and based upon the evidence and documents dealt with in the trial.

234. None of the passages relied upon can, in my judgment, properly be described as being critical invective, and I do not consider that the fair-minded and informed observer would consider they were either, or that any of them would justify that observer reaching the conclusion that there was a real possibility that the tribunal was biased against the Post Office.

Section 3: Criticism of the Post Office's witnesses

235. There are far fewer of these. I shall deal with them in turn, although some passages concern the same witness (for example Mr Beal is the subject of both [375] and [544]).

Mr Beal

236. This passage is [375]. Mr Beal did indeed give his evidence in this way. He was not asked in cross-examination how he had prepared for giving his evidence, but he did, in my judgment, behave in the way I identified in this passage. Simply because I did not find him persuasive, and also found his evidence was not consistent with professionally drafted legal documents such as the GFA, does not lend support to the Post Office's recusal application.

Mr Breeden

237. The passages relied upon are those at [400] and [408]. The statement made at [400] in relation to what he said was the difference (or lack of any difference) between the terms of the SPMC and the NTC is the sort of finding that a trial judge is permitted to make. As a single example, the two terms at [230] above in the two different contract forms make clear the difference on that one part alone.

238. So far as [408] is concerned, that again (as with Mr Beal) was the approach he adopted in giving his evidence. The senior personnel at the Post Office gave the impression that I explained in Judgment No.3.

Mrs Van Den Bogerd

239. The passages relied upon at [416], [418], [441] and [425] all relate to this witness. The statements upon which the Post Office rely in this application are all part of the assessment of her as a witness. In particular, the final sentence of [418], when she gave certain evidence about Mr Abdulla's case, and was then taken to her own witness statement for the Horizon Issues trial, which she had signed just a few days before, was extensively explored in her cross-examination.

Mr Dance

240. The passage at [451] relates to Mr Dance. He was cross-examined by Ms Donnelly. The sentence complained of is part of my assessment of him as a witness.

Mrs Dickinson

241. The passage at [458] concerns Mrs Dickinson. Enron was a major worldwide fraud scandal in the United States. Mrs Dickinson is a fraud specialist. She was asked about this in cross-examination and said "I'm not familiar with the Enron case". I rejected that evidence, as I believe a trial judge is entitled to do.

Conclusion passages on the Post Office's evidence

242. The passage at [544] relied upon by the Post Office in this application related to the overall conclusions in Judgment No.3 on the Post Office's witnesses generally. I found two particular exceptions to my general statement concerning their genuine belief. One was Mr Beal's evidence about the effect of the NTC and the SPMC. The other was Mrs Van Den Bogerd and her actual knowledge when cross-examined about Mr Abdulla's case. Both of these were fully explained and were findings on the evidence that the Post Office adduced in the Common Issues trial.

243. The passages at [545] to [547] are observations on the subjective belief of the Post Office witnesses. Two important points arise. Firstly, these were based on the extensive evidence and cross-examination, which lasted a period of six days just for the Post Office witnesses. That is a period of approximately 30 hours in total of cross-examination. A single day of transcript is over 200 pages, which means that approximately 1,200 pages of transcript were considered just to assess that cross-examination, in addition to the written witness statements themselves of the 14 witnesses, and all of the documents that were put to them. On Day 8 the only witness cross-examined was Mrs Van Den Bogerd, and there were 47 separate documents put to her (ignoring passages in the pleadings). The Post Office approach in its evidence for this recusal application is to pick single sentences or passages and either consider them out of context, and also to ignore the trial process that led to those statements being made in Judgment No.3.

244. Secondly, the subjective belief of the senior Post Office witnesses is not directly relevant to the findings to be made on the Horizon Issues in any event. These will be made after extensive expert evidence in the field of IT. Each expert has served two lengthy expert reports, four joint expert agreements have been reached, and although this evidence is yet to be tested by either side, it involves detailed analysis of the Horizon system (both Legacy and Horizon Online) together with consideration of software issues, PEAKS and KELS. Some software bugs are agreed; others are not. The subjective belief of a Post Office witness of fact such as Mrs Van Den Bogerd, who believes dishonesty or carelessness is the explanation for shortfalls and discrepancies in the majority of cases, is not relevant to the findings to be made on the detailed Horizon Issues, or (for that matter) on the numerous other issues yet to be tried on breach, causation, loss and the counterclaims. Her subjective belief was however relevant to the content of her evidence on the Common Issues trial.

245. Finally, on this section, it is the role of any trial judge to weigh and consider the evidence, assess the reliability of witnesses, and make findings. Each of the Post Office's witnesses were considered separately. Not all of them were criticised. Not all of the claimants' evidence was accepted either. Simply because certain comments were made about the manner and content of the evidence of some witnesses in the Common Issues trial does not mean that a particular witness will, or will not, have their evidence rejected, or accepted, in future trials, whether they are claimants or witnesses for the Post Office. I consider that a fair-minded and informed observer would reach this conclusion upon reading Judgment No.3.

<u>Section 4: Passages not contained in the evidence of Mr Parsons</u>

246. There were some passages relied upon by Lord Grabiner that were not specifically identified by Mr Parsons, namely [954], parts of [569] and [121]. [954] goes to the adequacy of training, and should be read together with [955]. As I have said above at

[178], these two passages were part of reaching the conclusion at [957] in Judgment No.3 that SPMs could not train their assistants to a higher level to that which they themselves had been trained. This was part of the answer to Common Issue 23. That was one of the issues expressly agreed to be dealt with in the Common Issues trial.

247. Further, Lord Grabiner went rather wider in respect of the long paragraph of Judgment No.3 that deals with findings as to factual matrix, than did Mr Parsons in his two witness statements in support. This paragraph is [569]. Lord Grabiner specifically identified the following as demonstrating that the fair-minded and informed observer would conclude that apparent bias was made out. The sub-paragraphs were (35), (40), (42), (50), (51), (59) and (70).

248. This is an optimistic list by the Post Office, because some of these facts were not even in issue as at the end of the Common Issues trial, and before Judgment No.3 was produced. That amounts that had been disputed by phoning the Helpline were treated as debts owed by the SPMs was accepted by Post Office witnesses. This emerged once the meaning of "settled centrally" was finally discerned. This came partly from an internal Post Office document dated 14 November 2008 called "TC/Debt Recovery Review". One question posed in that document was "what does settle centrally mean?". The answer in the same internal Post Office document was given as follows "Legal: "Settle centrally" signified acceptance of debt liability".

249. This was also accepted by Mrs Van Den Bogerd in her cross-examination. This point is relevant both to (35) and (40) in [569], and Mrs Stubbs' evidence (which I accepted) was that she was told no further action would be taken, yet she still received a written demand, a copy of that demand being deployed in court. The other passages are objections that the Post Office has to the findings of fact; the complaint in this application seems to be that the findings should not have been made. This is different to stating that the test for apparent bias is made out.

250. Finally, on the factual matrix, the Post Office entirely ignores a number of other facts which are contrary to the recusal application, such as the following three sub-paragraphs of the very same paragraph which expressly state:
"42. It is a matter for the Horizon Issues trial whether it would be right to infer or presume that a shortfall and loss was caused instead by a bug or error in Horizon."
And:
"72. Some Subpostmasters and assistants may act dishonestly in the conduct of their branches, including in defrauding the Post Office."
And also:
"79. Whether losses in branches arise in the ordinary course of things without fault or error on the part of Subpostmasters or their assistants can only be determined after the Horizon Issues trial. This is dependent upon the answers to the Horizon Issues, as the Horizon system is used by SPMs in "the ordinary course of things".
[121] is simply a summary of certain matters pertaining to Mr Bates.

<u>Section 5: Other matters relied upon by the Post Office in submissions</u>

251. Other matters have been advanced by the Post Office in its submissions on the recusal application, that go outside Judgment No.3 itself.

252. Some of these relate not only to the earlier Judgment No.2, which dealt with the Post Office's application to strike out large parts of the Lead Claimants' evidence in chief, but also to case management matters even prior to that, going back to my first involvement in the Group Litigation in 2017.

253. It is said in the Post Office's skeleton argument that at the Common Issues trial Mr Green QC for the Lead Claimants cross-examined the Post Office's witnesses "by reference to the irrelevant materials". There is no identification of such "irrelevant materials", so it is difficult comprehensively to consider that submission, but I have no recollection of objections being taken (routinely or at all) during the cross-examination of the Post Office's witnesses by the Post Office's counsel. I have also dealt above, in my general observations, how the Post Office cross-examined the six Lead Claimants, as well as the way that the Post Office both pleaded its case on the Common Issues, and made written submissions, and what they contained. Lord Grabiner, certainly in respect of Mr Beal's evidence, submitted that paragraph 33 of his own witness statement was irrelevant. I do not accept that, but given it formed part of the Post Office evidence adduced at the trial, Mr Green was entitled to cross-examine upon it.

254. There was some expressed concern during the Common Issues trial as to relevance, but it did not come from objections by the Post Office. When Mr Beal was being cross-examined about the GFA (the funding agreement between the Post Office and the NFSP) concern was expressed on this subject, but that concern came from the court, and wholly in the absence of any objection from the Post Office's Leading Counsel, whether on the basis of relevance or otherwise. I told Mr Green that he had to keep the issues in mind. The actual exchange was:
"MR JUSTICE FRASER: Mr Green, do bear in mind what -- you have to remember what the actual issues are in this case.
MR GREEN: My Lord, I have them well in mind.
MR JUSTICE FRASER: I am being fairly tolerant at the moment.
MR GREEN: This comes to an end quickly. It is quite important."
The cross-examination then continued for a short while thereafter. I have explained above why I consider the relationship between the Post Office and the NFSP, and whether the latter is independent, relevant to the Common Issues.

255. I made clear in Judgment No.2 that I would not strike out the passages in the claimants' evidence, but that there were a large number of Common Issues, and what was relevant to one would not necessarily be relevant to the others. I also explained the following at the end of [53]:
"However, should I in the fullness of time make findings on the Common Issues by taking into account matters irrelevant in law (and hence inadmissible) on some of those Common Issues, there is a remedy available".
The conventional remedy is by way of an appeal.

256. The Post Office also in its skeleton argument for the recusal application submitted that "it maintained its objections throughout" the Common Issues trial in terms of relevance. I do not consider that to be an accurate representation of the stance of the Post Office at the Common Issues trial. The Post Office submitted a great amount of evidence of its own on (for example) training, the Helpline, audits conducted on SPMs, fraud by SPMs, suspensions and terminations. One Post Office witness, Mrs

Dickinson, was a fraud specialist and her evidence was almost wholly directed to fraud. As another example, Mrs Ridge had interviewed Mr Abdulla pre-appointment, and she gave written evidence in chief about this. However, she also conducted his suspension interview, and she was cross-examined about this by Mr Green by reference to the transcript of that interview. Not only was there no objection to this from Mr Cavender, but Mr Cavender had also expressly and earlier cross-examined Mr Abdulla on the same matters by specific reference to his suspension interview in any event, as again I have explained above.

257. The sequence in which these matters unfolded is highly relevant, and in my judgment important. Mr Abdulla is a good example, but the same point could be made in respect of other Lead Claimants such as (for example) Mrs Stockdale. Mr Abdulla is a Lead Claimant and he was called as a witness. There were factual matters in issue concerning his contractual formation. Mr Cavender QC cross-examined him, not only on contractual formation, but also upon other matters that went to his credit and credibility, and including putting to him in terms that he had committed a criminal offence. Mr Cavender was entitled to do this, but it must have been a conscious decision by the Post Office to do so. This also included Mr Cavender putting to Mr Abdulla certain things that he, Mr Abdulla, had said in his suspension interview conducted by Mrs Ridge, and whether he had admitted false accounting in that interview. It is difficult to see how the Post Office can now in this application portray what occurred in that respect as not relevant. The Post Office certainly put it in issue at the Common Issues trial. Had Mr Cavender sought to object to the cross-examination of Mrs Ridge when that was taking place later in the trial, such an objection would have been considered. However, given Mrs Ridge's suspension interview of Mr Abdulla was effectively just the other side of the coin, of what had already been put to Mr Abdulla expressly on behalf of the Post Office, it is difficult to see how this stance can sensibly be maintained by the Post Office. The Post Office had expressly sought to adduce in the Common Issues trial Mr Abdulla's own oral evidence of what occurred at his suspension interview conducted by Mrs Ridge, and other evidence concerning his branch accounts, to mount a challenge to his credibility. That made evidence from Mrs Ridge on the same subject admissible. In written Closing Submissions the Post Office submitted Mr Abdulla was lying. This is not consistent with a submission, in this recusal application, that the Post Office "maintained its objections throughout".

258. This aspect of the submissions upon the recusal application does have the appearance of the Post Office, with hindsight and having received Judgment No.3, wishing it had conducted the trial of the Common Issues differently. All that could be done by the court in Judgment No.3 was to resolve the Common Issues on the evidence advanced by each party, and in the light of their detailed legal arguments, and making clear that no findings were being made on breach, causation, loss and the Horizon Issues. That is what was done.

259. Lord Grabiner submitted that Judgment No.3 had gone far too far in analysing the evidence of the Lead Claimants. He drew specific attention to the number of paragraphs of Judgment No.3 in which each Lead Claimant had their evidence considered. I do not consider this to be a sound submission by Lord Grabiner. The number of paragraphs devoted to witness analysis is probably not a sound comparator. The Post Office's evidence was analysed over 203 paragraphs, together with the

further 25 paragraphs dealing with the relationship between the Post Office and the NFSP. Comparing this, say, to the 55 paragraphs in which Mr Bates' evidence was considered, or the 36 paragraphs concerning Mrs Dar, is not particularly useful, nor do I consider it to be an appropriate approach. All the evidence was considered in a reasonable amount of detail. That was necessary to identify the way that the findings for the factual matrix were made. Had there been no issues of fact between the parties, Judgment No.3 could have started at or about Part E, when the factual matrix is explained and then the legal issues considered. Both the Common Issues trial, and Judgment No.3, would have been markedly shorter had this been done. However, it was not, which was why so many weeks of factual evidence took place.

260. Lord Grabiner also submitted that Judgment No.3 ought not to have considered the evidence in the detail that it did. I reject that submission. The factual evidence of both sides had to be considered in detail because there were so many facts in dispute. Judicial evaluation of evidence in any case requires a proper evaluation of all the evidence, including consideration of its strengths and weaknesses, as well as testing what a witness says (for example) about the contents of a contemporaneous document, compared to the actual text of that document. If any authority is needed for that, it is to be found at [32] to [39] in ***Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz*** [2016] EWCA Civ 556, and in particular at [39] in the judgment of the Master of the Rolls:

"[39] Our system of civil justice has developed a tradition of delivering judgments that describe the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. This requires that a judgment demonstrates that the essential issues that have been raised by the parties have been addressed by the court and how they have been resolved. In a case (such as this) which largely turns on oral evidence and where the credibility of the evidence of a main witness is challenged on a number of grounds, it is necessary for the court to address at least the principal grounds. A failure to do so is likely to undermine the fairness of the trial. The party who has raised the grounds of challenge can have no confidence that the court has considered them at all; and he will have no idea why, despite his grounds of challenge, the evidence has been accepted. That is unfair and is not an acceptable way of deciding cases."

(emphasis added)

261. The Post Office litigation is particularly fact heavy, and given it is Group Litigation, if these trials are to have any particular utility, the judgments have to deal with contested points in some detail. This is part of demonstrating that the essential issues have been addressed, which parts of the evidence have been given what appropriate weight, and why.

262. Finally, Lord Grabiner submitted that this application was a clear case of the test for apparent bias being made out. He submitted that the different elements of Judgment No.3 under consideration, either individually or collectively, justified, if not required, my recusal from any further involvement in this case, including bringing the Horizon Issues trial (currently practically at the end of the factual evidence) to a premature end. He realistically accepted that the consequence of this would be that the Horizon Issues trial would have to start again before another judge. The claimants took a markedly different approach. Their submission, summarised at paragraph 132 of their

skeleton argument, was "This Application is hopeless and should not have been made".

Apparent bias

263. Here, I have taken account of the well-known legal test, and analysed all of the different features and passages of Judgment No.3 against that test, both collectively and individually, and with considerable care.

264. Lord Grabiner submitted that the fair-minded and informed observer would not consider the overall outcome of the Common Issues trial. When I asked him this specific question, he said "absolutely not", and also submitted that it would be irrelevant. I have therefore considered the matter both with, and without, taking account of the overall result in the Common Issues trial.

265. Firstly, approaching it on the basis urged upon me by Lord Grabiner, I conclude that there are no grounds for any conclusion that the test of apparent bias has been made out. In my judgment, the fair-minded informed observer would not reach the necessary conclusion in respect of any of the passages identified by the Post Office. I do not consider that there is anything contained in Judgment No.3 that demonstrates that I have reached any sort of concluded view on any matters going to breach, causation, or loss, and/or upon any of the Horizon Issues, or that there is a real possibility that I have had, or otherwise that my present and future involvement is tainted by apparent bias.

266. However, I must make it clear that I disagree with Lord Grabiner's submission on this point. What his submissions on this point amount to is that a fair-minded and informed observer would only read *some* of Judgment No.3, and not take into account all of it, including its result. That is, in my judgment, fundamentally wrong. In my judgment, a fair-minded and informed observer *would* take account of everything contained in Judgment No.3, including the overall result. They would not consider just one part of it, (or even isolated passages of one part). I consider that the fair-minded and informed observer would take into account the overall result of Judgment No.3, and not limit themselves to the isolated passages relied upon by the Post Office in this recusal application (which in my judgment are, in any case, taken wholly out of context from the rest of the judgment in any event).

267. Were they to do so, the conclusion that the test for apparent bias is not made out would be even more readily reached. This is because on any view, the Post Office was partially successful on a number of the Common Issues.

268. I consider the Post Office's written submissions on costs, which I refer to above at [26] and which were received on Friday 29 March 2019, accurately reflect the state of play in the litigation after Judgment No.3. These were served in respect of the costs of the Common Issues trial, and release of the security of £3.9 million which I had ordered be provided in the Post Office's favour in September 2018. Oral submissions will be required in due course on both of those matters to deal with the costs of the Common Issues trial, which led to Judgment No.3, and that issue has not yet been decided. I consider it noteworthy that the Post Office's written submissions on costs of the Common Issues maintains at paragraph 4 as follows:

"4. It is submitted that the costs should be reserved, because it is too soon to tell whether any Claimant will be successful."
It was also contended for in the alternative by the Post Office's solicitors in those written submissions (at paragraph 3(b)) that "any costs order in the Claimants' favour should reflect the fact that they were not wholly successful".

269. I consider that both of these statements accurately reflect the outcome of Judgment No.3. They are, however, arguably contradictory to the stance adopted by the Post Office in the recusal application. The fact that the written submissions were lodged by WBD, and are not signed by any of the Post Office's counsel (they have three QCs and four juniors in total, two of those QCs and one junior being instructed on this application) does not dilute this point, in my judgment. The submissions on costs were served on behalf of the Post Office by its legal advisers. I do not see how a sensible acceptance of the outcome of Judgment No.3 as being partly in the Post Office's favour, such that it is not possible to see which side will prevail, can readily sit with submissions that Judgment No.3 on its face demonstrates apparent bias. I wish to make it clear that the outcome of Judgment No.3 is not determinative of this application. However, it is a relevant fact that the fair-minded and informed observer would take into account, and would weigh in the balance. The Post Office seeks to have me ignore it entirely, and I do not consider that to be correct.

270. The claimants maintain that the recusal application essentially attacks the contents of Judgment No.3 (and also Judgment No.2) and challenges (albeit by an unconventional route) those two judgments, as well as seeking to recuse me from further involvement. I do not consider that Judgment No.2 can now be challenged on appeal in any event, but this application is not about Judgment No.2. The Post Office has not yet issued any application for permission to appeal, so far as any appeal in respect of Judgment No.3 is concerned, but given paragraph 17 of the skeleton argument on the recusal application submits that I went "seriously wrong in two key respects" I assume an application for permission to appeal might be expected to occur. Lord Grabiner submitted at the hearing of the application that an appeal would be brought in respect of Judgment No.3, but as yet, no permission to appeal has been sought, let alone granted. I do not consider whether Judgment No.3 is to be challenged by the route of appeal to be relevant to this application.

271. I consider that it is important to keep separate the two different avenues. This is not an application for permission to appeal, it is an application for recusal. There should be no confusion in this respect; the legal test for apparent bias is completely different to that for whether to give permission to appeal.

272. Certain of the passages of Judgment No.3 have been argued by Lord Grabiner QC on this recusal application as demonstrating that a fair-minded and informed observer, in possession of all the material facts, would conclude that there was a real possibility that I was biased against the Post Office. That is different to arguing that those passages are wrong, or contained matters that were taken into account on particular Common Issues when they ought not to have been. It is the legal test for apparent bias that I have applied upon this application.

273. Nothing that I have stated in this judgment on the recusal application should be taken as my having made my mind up on any future issues yet to be decided, and that includes any consequential matters arising out of Judgment No.3 including costs.

Waiver and delay in making the application

274. Even if I had found that there were grounds of apparent bias on the face of Judgment No.3, I would not have recused myself. This is because of the fact that the Post Office waited until almost two weeks after it had received Judgment No.3 before it did anything in respect of making an application to recuse.

275. Here, there was not only silence by the Post Office, and continuing participation in proceedings, but there was active involvement in the actual Horizon Issues trial. The parties had the draft of Judgment No.3 on 8 March 2019. The Horizon Issues trial commenced on 11 March 2019, and the final version of Judgment No.3 was handed down at 12.00 noon on 15 March 2019. The Post Office not only were represented by counsel in court every day from 11 to 15 March 2019, but an order was produced in agreed terms by the parties which included (at my suggestion made on Day 1 of the trial) an extension of the period for either party to make an application to appeal, so that this did not have to be dealt with by them during the Horizon Issues trial. Whatever the "watershed moment" was (to use the expression from [36] in ***JSC BTA Bank v Mukhtar Ablyazov*** [2012] EWCA Civ 1551) it must have come, in my judgment, no later (and putting this at its most favourable for the Post Office) than 18 March 2019 when it called its first witness of fact, who happened to be Ms Van den Bogerd, one of the senior executives in respect of whom my comments in Judgment No.3 are said to justify the recusal application. Even if an actual application could not have been prepared by 18 March 2019, which I doubt, since by then the Post Office would have had the draft for 10 days, the Post Office could have asked for a short adjournment to consider such an application, prior to calling any of its own witnesses. Instead, the Post Office ploughed on and called almost all its witnesses of fact.

276. In fact, what should have happened on the morning of 11 March 2019 (the first day of the trial) or the morning of 12 March 2019 (the second day, just before any witnesses were called) is the court should have been asked for a short adjournment, and told why.

277. Even if that is too soon, which I do not accept, the point immediately prior to the Post Office calling its first witness was certainly not too soon, and in my judgment was the very latest. By then – 18 March 2019 - the Post Office would have had the draft of Judgment No.3 for ten days, since 8 March 2019.

278. Not only that, but this delay is not explained, in even the most cursory or terse terms, in either of Mr Parsons' 14th or 15th witness statement. It is entirely ignored. I do not consider recusal applications to be entirely run of the mill events. This is even more so when one considers this recusal application is of a Managing Judge in Group Litigation. It is also even more so when it is made in the very middle of a lengthy trial. An explanation is called for in my judgment, particularly in the light of the authorities above concerning waiver.

279. I expressly asked Lord Grabiner about this delay in making the application. The exchange was as follows:

LORD GRABINER: My understanding is that we received the draft judgment on the Friday immediately prior to commencement of the Horizon trial on the Monday.
I am afraid, standing here now, I don't know what the dates are.
MR JUSTICE FRASER: It is the 8th. It was sent out on Friday, the 8th [March]. Monday, the 11th, was oral openings.
LORD GRABINER: There was a passage of time between then and the decision that was communicated to make this application. I need hardly point out that this has been -- this is regarded as an extremely serious application to be making. It was made at board level within the client and it also involved the need for me to be got up to speed from a standing start.
And I am not the only judicial figure or barrister that has looked at this with a view to reaching that conclusion. It has also been looked at by another very senior person before the decision was taken to make this application.
The delay, such as it is, is very, very tiny in the context of the seriousness of case that is being put forward.
We had no control over the commencement of the Horizon case, obviously, because that was already predetermined by the arrangements that were then in place.
MR JUSTICE FRASER: I suppose one might observe an adjournment could have been requested of a week or something.
LORD GRABINER: It may be. I just don't know because I wasn't involved at that stage. I have only been involved just for a few days, literally."

280. The following important points can be made:
1. Evidence should have been served by the Post Office dealing with why the application was not issued until 21 March 2019, and also why no prior notice was given, even limited to the fact that consideration to such an application was being given.
2. Delay has to be weighed in the context of an actual trial about to start, and then being underway for some time.
3. This delay was not "tiny". It was substantial in the context of the ongoing Horizon Issues trial.
4. That trial is of the Horizon Issues, crucial in the context of this litigation as a whole, and this went on for almost two full weeks before the application was issued.
5. Entirely separate counsel teams have, for the Post Office, been dealing with the Common Issues (and associated recusal application), and the Horizon Issues. Different Leading Counsel are at the helm for the Post Office in each of these two areas. The fact that the Horizon Issues trial was underway does not excuse the delay, it actually makes it even more pronounced.
6. There can be no question that a modest adjournment could have been sought by the Post Office, even if the application itself could not be issued before 21 March 2019.

281. Nor is the scope of Mr Parsons' 14th witness statement particularly detailed or wide, such that it could be said to have required very lengthy preparation. It consists of 26 paragraphs only. Paragraphs 1 to 20 are historical. The last six paragraphs take up less than one page. I consider that such a statement could have been prepared extraordinarily quickly, and easily in less than one day.

282. The Post Office conducted itself for the whole of the factual evidence that was called during the first two weeks of the Horizon Issues trial (16 different witnesses in total)

without any hint of making any application that I recuse myself. This falls to be considered, not only in terms of waiver (which has been dealt with above) but also in terms of other consequences. Almost the entirety of the evidence of fact of both parties has already been fully cross-examined in the Horizon Issues trial.

283. This could potentially give the Post Office an enormous advantage if the Horizon Issues trial were to be abandoned, and started again before another judge. Every single one of its witnesses of fact who has been cross-examined so far in the Horizon Issues trial, which is all of them save for Messrs Parker and Membery, would have had a full practice run of that cross-examination before me. "The trial is not a dress rehearsal. It is the first and last night of the show" is an expression that has been used at least twice before at appellate level, by Lewison LJ at [14] in ***FAGE UK Ltd v Chobani UK Ltd*** [2014] EWCA Civ 5, and more recently by Coulson LJ in ***Wheeldon Brothers Waste Ltd v Millennium Insurance Company Ltd*** [2018] EWCA Civ 2403 at [7]. Both of these cases concern the approach of appellate courts to findings of fact, but as a principle it demonstrates that a trial is not supposed to be a practice run. I do not, for a moment, consider that this principle should be considered to be more important than the fundamental principle of natural justice that parties are entitled to have their disputes resolved by an impartial tribunal, without actual or apparent bias. However, it demonstrates that it was incumbent upon the Post Office, once it considered the contents of Judgment No.3, to have asked (at the very least) for the start of the Horizon Issues trial to be postponed so that it could consider the situation, and if necessary make the recusal application before any evidence of fact was heard. Instead, the Post Office waited until the final day of the second week of the trial, and then made the application practically at the very end of its own factual evidence. The Post Office had certainly had time to consider Judgment No.3 in detail by the end of opening submissions on Day 1, as their Leading Counsel drew my attention to a passage in the draft judgment at [341](4) regarding the cross-examination of Mrs Stockdale. The first witness of fact was not called by the claimants until Tuesday 12 March 2019 when Mr Latif gave evidence by video link from Kashmir.

284. I consider that it was incumbent upon the Post Office to have issued its application far more quickly than it did, given it had the draft Judgment No.3 from 8 March 2019, and given the Horizon Issues trial started on 11 March 2019. Rather than acting quickly and promptly, the Post Office delayed, and as explained above, acted somewhat curiously. When I asked Mr de Garr Robinson QC about the application at 2.00pm on the day it was issued, he did not know very much about it. The Post Office has at least three Queens' Counsel acting for it in this litigation. Mr de Garr Robinson QC is the Post Office's trial counsel in the Horizon Issues trial, but he is not the only QC acting for the Post Office. Mr Cavender QC acted for it in the Common Issues trial, and has attended numerous interlocutory hearings, including two case management conferences for the third trial set down for November 2019, and he is acting on this recusal application. I was told on 21 March 2019 that Lord Grabiner QC was also acting for the Post Office on the recusal application. The fact that Mr de Garr Robinson was extensively involved in the actual Horizon Issues trial from 11 March 2019 onwards does not excuse the Post Office in delaying the making of the application until the last day of the factual evidence. A short adjournment could have been requested at the very least. In any event, the recusal application could and should have been made far earlier.

285. I have found that there is no apparent bias in any event. However, even were I to have concluded that point to the contrary, and found that there was sufficient to justify the Post Office's application for recusal, I consider the delay, and the continued conducting of the Horizon Issues trial, including both the cross-examination of all of the claimants' witnesses of fact, and the calling of almost all of the Post Office's own witnesses of fact, to constitute an unequivocal waiver of any right the Post Office might have had to ask me to abandon the Horizon Issues trial and recuse myself from further involvement as the Managing Judge.

286. Finally, at [71] and [72] of ***JSC BTA Bank v Mukhtar Ablyazov*** the question of what was called on that appeal "analogous" issues was considered. Teare J had referred to this as an "overlap" of issues, the overlap being between matters considered on the committal hearing and the substantive trial(s) to come. Rix LJ stated:
"In my judgment, however, concepts of analogy or overlap are too general and amorphous to give definitive shape to the doctrine of pre-judgment in what must always be a fact-sensitive enquiry."

287. He did however consider the concept and stated: "However, even if I do seek to apply the concept of overlap, in my judgment the judge was right to say and Mr Smith was right to submit that the overlap between the issues at the committal proceedings and at trial will be small."

288. In the instant case, there is absolutely no overlap at all between the Common Issues, which deal with whether the contracts are relational, contractual interpretation of numerous terms, incorporation of onerous and unusual terms, the Unfair Contract Terms Act, agency and other associated matters; and the Horizon Issues, which concern computer issues and in respect of which each party is calling an expert witness in the field.

289. Having considered all the matters relied upon by the Post Office to support its application, and applied the necessary tests, this disposes of the application brought by the Post Office. That application is dismissed. However, I will go on to identify some other matters in any event. A fair-minded and informed observer would take account of these particular features of the litigation. I have however reached my conclusion on the application without taking these features into account.

Other potentially relevant matters

290. There are other matters which I consider to be potentially relevant on this application for recusal. There have been a large number of interlocutory applications, a number of which have been resolved in the Post Office's favour, and some of which are significant. As an example, the parties were agreed that the claimants would provide security for the Post Office's costs (as a resolution of a contested application by the Post Office to join the claimants' third party litigation funder as a party to the litigation). However, the amount was hotly disputed and the claimants wished only to provide security in the sum of £2.5 million. After a contested hearing, I ordered security for the Post Office's costs in an Order dated 26 September 2018 in a far higher amount, namely £3.9 million. This meant that the claimants' funders had to provide a substantial amount in security above the amount contended for, and provide

£1.4 million more than they were prepared to provide. This would be taken into account by the fair-minded observer.

291. Turning to the dicta of Longmore LJ at [18] in ***Otkritie***, I am not aware of the Post Office seeking to appeal any of my interlocutory decisions.

292. I have also been directly critical of both parties in this litigation. At [13] of Judgment No.2 "Strike Out Application" [2018] EWHC 2698 (QB) I said:
"I have now had a total of 10 separate interlocutory hearings with these parties in a 12 month period prior to the trial of even the first issues. The legal advisers for the parties regularly give the appearance of taking turns to outdo their opponents in terms of lack of cooperation. Behaviour from an earlier era, before the overriding objective emerged to govern all civil litigation, has appeared to become almost the norm, at least from time to time. One would have thought that *all* of the parties involved in this litigation would wish to resolve the many different issues between them – which are highly controversial – fairly, speedily and with as much cost-efficiency as possible. I am making no findings about this at this stage, and which party is primarily responsible for this state of affairs is only likely to be considered, if at all, at the final costs stage of the litigation, far in the future. However, it appears to me that extremely aggressive litigation tactics are being used in these proceedings. This simply must stop. It is both very expensive, and entirely counter-productive, to proper resolution of what is so far an intractable dispute. I made similar comments in Judgment No.1. These must have fallen on deaf ears, at least for some of those involved in this case."

293. I also said at [16] in the same Judgment No.2:
"However, this application regrettably falls into a pattern that has, in my judgment, clearly emerged over the last year at least. Attempts are being made to outmanoeuvre one another in the litigation, and tactical steps have led to constant interlocutory strife. This is an extraordinarily narrow-minded approach to such litigation."

294. The claimants originally did not want the next substantive trial (which is currently called Round 3) to take place in 2019 at all. Time was requested for a period following the Horizon Issues in order to hold a mediation. I was prepared to provide some time, but ruled against having Round 3 in 2020 and set it down for the autumn of 2019. The claimants did not wish me to do this.

295. I have already identified that the findings in Judgment No.3 on the Common Issues were not wholly in the claimants' favour. There were 23 different issues and two of them, 17 and 18, did not arise (these related to what was called the "true agreement" or ***Autoclenz*** issue). These issues were advanced by the claimants in the alternative, which meant effectively that the claimants' case on this alternative approach was not preferred. Of the other 21 Common Issues, the Post Office's case was preferred in five (those numbered 10, 11, 15 (in part), 21 and 22). The Post Office's case was also preferred, in part, in some of the others. For example, in Common Issue 5, 33 separate express terms were alleged by the claimants to be onerous and unusual. I found that only 8 were, with the potential of another three (if my finding on relational contracts were wrong) and another two (if my construction that termination provisions without notice were to be construed as applying to repudiatory breaches) also being onerous and unusual in those alternatives. This therefore meant that the maximum number of terms that could be classified as being found in the claimants' favour was 13 out of 33

in total, but this number is in reality only 8 out of 33, if my findings on relational contracts and repudiation were correct. Termination without notice provisions being construed as relating to repudiatory breaches was the Post Office's case.

296. I also found (in relation to Common Issue 2(t)) that there was no requirement upon the Post Office to take care in performing its functions which could affect the business, health and reputation of the claimants, and that this requirement extended only to matters that could affect the branch accounts. I also found in relation to Common Issues 5 and 6 that due to the signature of SPMs on the NTC contract form, and the recommendation to those SPMs to seek legal advice, for those who had contracted upon the NTC, all of the clauses in the NTC were incorporated, even those that were onerous and unusual, due to the law on incorporation. I also did not accept all of the Lead Claimants' evidence of fact. For example, I found that Mr Trotter had not told Mrs Dar in interview that she did not need to get legal advice. To portray the outcome of Judgment No.3 as an unqualified victory for the claimants on all the Common Issues would not be accurate.

297. I have already stated, in Judgment No.2, that the court is not concerned with either marketing or public relations for any litigants, and the guiding principle is that of open justice. This arose in the context of the Post Office expressly stating that one of the reasons why it sought to strike out some of the claimants' evidence was for reasons of adverse publicity.

"55. Mr Parsons gave evidence at paragraph 36 of his 9th witness statement in support of the application stating that the defendant was concerned that "advance allegations of misconduct by Post Office at the Common Issues Trial" would be made by the claimants for "prejudicial reasons or to generate adverse publicity for Post Office". (The defendant does not use the definite article when referring to itself.) It seems to me that this narrow passage in the witness statement of Mr Parsons, expressly supporting the application, might contain the origin of the expenditure of time, resources and money by the defendant on restricting the claimants' evidence, that has been the subject matter of this application. It certainly must have had some bearing upon the application in the defendant's mind, otherwise Mr Parsons would not have included it in his witness statement. Such concerns would be pertinent if the challenged passages constituted the airing of "irrelevant grievances", to use the expression of Harman J in ***Re Ubisoft***, quoted by Mann J in the passage quoted above at [4] of ***Wilkinson v West Coast Capital*** at [22] above.

56. However, they do not, in my judgment. I consider that the challenged evidence is relevant to the Common Issues trial for the reasons that I have explained, is therefore admissible, and ought not to be struck out. This conclusion has been reached having considered the principles applicable to an application such as this, and the Common Issues to be tried. Whether this "generates adverse publicity" for the defendant is not a concern of the court, as long as the evidence is properly admissible under the CPR, which I have found it is. The court is not a marketing or PR department for any litigant, and the principle of open justice is an important one."

These statements also equally apply in terms of how litigants may seek to portray the outcome of any judgment. The reasonable and fair-minded observer will neither make his or her "judgment after a brief visit to the court" (to adopt the phrase of Sir Thomas

Bingham MR in ***Arab Monetary Fund v Hashim (No.8)***), nor will they skip through a judgment of 1122 paragraphs (excluding appendices) or rely upon isolated extracts. They will be aware of the detail of the judgment, and also be aware of the history of the litigation.

298. There was no appeal from Judgment No.2 on the Post Office's application to strike out the claimants' evidence of fact, and indeed, the Post Office did not even ask me for permission to appeal. The application to strike out the claimants' evidence was heard on 10 October 2018 and the judgment was handed down on 17 October 2018. The Common Issues trial commenced on 7 November 2018, and there was ample time for the Post Office to have mounted an appeal against the dismissal of that application, if so advised. The evidence sought to be struck out by the Post Office was therefore admitted as evidence for the Common Issues trial, and it was cross-examined upon by the Post Office extensively. I do not consider that I have relied upon irrelevant matters in arriving at my conclusions on the answers to the Common Issues, but if I have, then the correct route to remedy that would by way of an appeal. Permission has not yet been sought by either party to appeal any part of Judgment No.3.

299. Miss Philips, in her evidence for the Post Office in the Horizon Issues trial, readily confirmed what had been in dispute for so long during the Common Issues trial, namely that SPMs had no option but to accept the figures provided to them, even though amounts may have been "settled centrally". This is notwithstanding that her original terminology in her witness statement said that SPMs "chose to accept" TCs. She accepted that SPMs did not have a choice. It had been necessary for me to make findings on this very point in the Common Issues trial, and all the Lead Claimants in that trial (but particularly Mr Abdulla) had been directly challenged on this very point in their cross-examination. Mr Godeseth also gave evidence in the Horizon Issues trial that the lack of any ability on the part of a SPM to dispute an item in Horizon was "by design". All a SPM could do was to telephone the Helpline. This shows that the Post Office had been advancing a case, at least for a substantial part of the Common Issues trial, which was directly contrary to the evidence of its own witnesses of fact in the Horizon Issues trial.

300. I do not consider that what has occurred in the Horizon Issues trial can be entirely irrelevant to the recusal application. However, I consider that great care must be taken to ensure that forensic developments in the ongoing trial are not allowed to become any part of the focus on the recusal application. The reason for identifying the point in [299] is it shows that the Post Office has, to date, put in issue matters that ought not to have been put in issue. In resolving those matters, hearing contested matters of fact and making the necessary findings, it was necessary to go somewhat wider than my initial comments at earlier case management hearings about the expected scope of evidence for the Common Issues trial, when I (perhaps over-optimistically) assumed that the parties would agree non-contentious matters. This would have left the real battleground as those areas of fact, and law, that were truly contentious, so that cost-effective and proportionate resolution of the litigation could occur.

301. Finally, the role of Managing Judge in Group Litigation in particular, is such that some litigants may be extremely unhappy with what occurs at different points throughout. Possibly all of the litigants will be extremely unhappy with what occurs at

some stage or another during what is already (in this case) about three years since the first claim form was issued. Effective case management is required to move the litigation forwards, and this may cause discontent to some, or even all, as well as the substantive findings themselves. Substantive issues cannot all be resolved in one trial, so answers on some substantive issues will inevitably be provided before others. To deal expressly with the point raised at [32] in ***Otkritie International Investment Management Ltd and others v Urumov*** [2014] EWCA Civ 1315, I do not feel any embarrassment or difficulty in proceeding with this group litigation, either as a result of the contents of Judgment No.3 or of the recusal application itself.

302. I intend to continue with the Horizon Issues trial, and I intend to continue as the Managing Judge. I am confident that I can resolve all the existing and future issues in this litigation in a wholly impartial and judicial manner. However, the timetable going forward for the resumed Horizon Issues trial must take account of the significant disruption to that trial already caused by the recusal application; the possibility that the Post Office may seek to obtain permission to appeal this decision on my recusal; as well as the effect of the impending Easter break. I will now deal with this with counsel.